ELECTION CASES

REPORTS OF DECISIONS

UNDER THE

DOMINION AND ONTARIO ELECTION ACTS,

AND THE

ONTARIO VOTERS' LISTS ACT.

1891-1900

WITH A TABLE OF THE NAMES OF CASES REPORTED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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TABLE

OF THE

CASES REPORTED IN THIS VOLUME.

TABLE

OF THE

NAMES OF CASES CITED IN THIS VOLUME.

H.

I.

J.

K.

L.

M.

Mc.

N.

P.

R.

S.

T.

W.

Y.

ERRATA.

Page 47. Head-note, 6th line, for "them" read "it."

Page 57. Line 13 from bottom, for "(1889) C.L.T. Occ. N. 249" read (1898), 18 C.L.T. Occ. N. 249."

Page 64. Line 5 of head-note, strike out the word "that" after "essential."

Page 144. Line 3 from bottom in head-note, after "1897" insert "ch. 12."

Page 150. Head-lines. For "Payment of Petitioner" read "Payment by Petitioner." For "Claim of Security Deposited" read "Claim on Security Deposited."

REPORTS

OF

ELECTION CASES.

SOUTH LEEDS.

DOMINION ELECTION.

BEFORE MR. JUSTICE OSLER IN CHAMBERS.

September 30, 1891.
October 3, 1891.

NATHAN KELLY, *Petitioner,*

v.

GEORGE TAYLOR, *Respondent.*

Change of Solicitors—Right to object to—Withdrawal of petition—Deposit as Security for Costs—Time to apply to substitute Petitioner.

The only person who can complain of an order changing solicitors in an election matter is the former solicitor, and his right is a limited right; and the Court will not consider it unless as a part of a scheme to get rid of the petition.

An ordinary voter has no status to attack the order.

Even if the applicant here had the right to move against an order allowing the petition to be withdrawn :—

Held, on the evidence adduced, that there was no irregularity in the application to withdraw.

Semble, even if there was reason to suspect collusion, the petitioner has the right to withdraw, but the Judge might order that the deposit should remain as security for the costs of a substituted petitioner.

The proper time to make an application to substitute a petitioner is at the time the motion is made to withdraw the petition, and the Judge's power is limited in that respect. If no application is then made, and the order for withdrawal is granted, the petition is out of Court and cannot be revived.

Even if there was power to make such an order at a later period it should be applied for within a reasonable time and full explanation of the delay given, neither of which conditions being complied with and a delay of more than two months occurring :—

Held, that the application here was too late.

THIS was a motion (1) to set aside an order changing the petitioner's solicitor; (2) to set aside an order giving the petitioner leave to withdraw the petition; or (3) to reinstate the petition and substitute the applicant as petitioner.

M. G. Cameron, for the applicant.
Armour, Q.C., for the respondent.

OSLER, J.A.:—

(1) Motion by W. P. Dailey to set aside an order of 4th July, 1891, changing the petitioner's solicitors from Messrs. Ross, Cameron & McAndrew to Harvey & Macdonald; (2) to set aside an order of the 13th July, 1891, giving the petitioner leave to withdraw the petition on the ground of irregularity as set forth in the affidavits filed on the present motion, or in the alternative; (3) to reinstate the petition and substitute Dailey as petitioner in lieu of Kelly.

The applicant has no *locus standi* to attack the order of the 4th July changing the solicitor. It was and is no concern of his, and, *qua* order, does not affect him.

The only persons who could complain of it are the former solicitors, and they, only so far as their right to or lien for costs might be affected, which is in this case not at all, and they do not move.

I therefore consider that order only so far as it may be considered as part of a scheme to get rid of the petition.

It is, though obtained *ex parte*, admittedly regular, so far as any objection on that ground is concerned: see Con. Rule 463.

It is suggested that it was obtained by suppression or non-disclosure of material facts, but this is denied, and my brother Maclennan informs me that it was not the case, and that he considered whether or not it was proper

or necessary that notice should be given to the solicitors on the record. He determined that it was not necessary, inasmuch as there was no application with regard to or affecting the deposit which had been made as security for costs.

Next, as to the order of the 13th July, 1891, giving leave to withdraw. I will assume that the applicant is a person who can move against it, although if I had to decide that point I should require more time for consideration, and I am at present of the contrary opinion.

The irregularity complained of is that there were no affidavits of the financial agents of the sitting member and defeated candidates.

The practice does not prescribe the evidence, except as regards formal evidence to be given on the motion for leave to withdraw, and although it might be well to require the affidavits of the election agents, as the practice under the English C. & I. P. P. Act 1883, 46 & 47 Vict., ch. 51, sec. 41, provides, and as I think I shall be disposed to do in future, they are not necessary here unless the Judge before whom the motion is made insists upon their production, and it has not been usual to do so. The motion, therefore, was not irregular on this or any other ground that I can see.

The notice of motion was published even more fully than was necessary, as it was published in two newspapers in the electoral division, and there is every reason to believe that it was brought fully before every one who was interested in opposing the motion. Indeed, on the applicant's own shewing, the failure to oppose it was caused by the mistake or carelessness of the gentleman who undertook to send Mr. Cameron the newspaper containing the notice of intention to move to withdraw, in sending it to the wrong address.

Moreover, as the motion to withdraw seems to have been anticipated some three weeks before the 27th July

(see the applicant's affidavit sworn on that date), it is somewhat surprising that all parties were not more diligent than they appear to have been to discover whether proceedings were being taken to that end.

I must hold that these proceedings were regular, and, conceding that the now applicant is in a position to urge the facts disclosed upon the depositions and affidavits now filed, as reasons against the withdrawal and for rescinding the order, I am of opinion, after fully considering them, that they would not have been sufficient, and are not sufficient, for that purpose. I cannot say that they prove either collusion or that the petitioner did not in good faith authorize the application.

The order for leave to withdraw, therefore, cannot be interfered with, and I must add that even if it had appeared that there was reason to suspect collusion it would seem that the applicant would have had the right to withdraw, though the Judge would in that case have been at liberty to order that the deposit should remain as security for the costs of the substituted petitioner. It is not, however, necessary to determine this point.

Then, can I now give leave to the applicant to intervene, and make an order to substitute him as petitioner? I think not. What the Act provides is that *on the hearing* of the application to withdraw, a person may apply to be substituted as petitioner, sec. 56, sub-sec. 3: And the Rule (41) that any person who might have been petitioner may, within five days after publication of the notice, give notice (as prescribed) of his intention to apply *at the hearing* to be substituted for the petitioner, but that the want of such notice shall not defeat such application if *in fact made at the hearing;* see also Rule 42.

All these provisions go to shew that the order for substitution must be made at the hearing of the motion to withdraw, and that the power of the Judge is strictly

limited in this respect. If no application is made at that time, and an order for withdrawal is granted, the petition is, in my opinion, out of Court and cannot afterwards be revived.

But, further, if that view is incorrect, and there is power to make an order at a later period, it should be applied for within a reasonable time, and there should be a full explanation of any delay; that is not done here.

It appears that instructions were given early in July. It is not shewn *when* the discovery was made of the order to change the solicitor.

The order for withdrawal was made 13th July, after due publication which came to the notice of interested persons. The applicant does not say that it did not come to his notice in due time, and notice of the present motion was not given until the 15th August, more than two months after the order complained of was made.

On all grounds, therefore, the motion fails, and must be dismissed with costs to be paid by the applicant, Wm. P. Dailey.

G. A. B.

SOUTH RIDING OF ESSEX.

DOMINION ELECTION.

BEFORE FALCONBRIDGE AND STREET, JJ.

SANDWICH, *28th December, 1891.*

CHARLES TOFFLEMIRE, *Petitioner.*

v.

HENRY W. ALLAN, *Respondent.*

Substituting New Petitioner—Jurisdiction—Dominion.

The Court has no power in a proceeding under the Dominion Controverted Elections Act to substitute a new petitioner unless either no day has been fixed within the time prescribed by statute or notice of withdrawal has been given by the petitioner; and where a petition came regularly down to trial and the petitioner stated he had no evidence to offer, an application of a third party to be substituted as petitioner upon vague charges made on information and belief, of collusion in the dropping of the petition, which were contradicted, and of corrupt practices, was refused and the petition dismissed with costs.

THIS election petition wherein Charles Tofflemire was petitioner and Henry W. Allan respondent, and which was in respect to the election of a member for the House of Commons, for the electoral district of the South Riding of the County of Essex, holden on February 26th and March 5th, 1891, came up for trial before FALCONBRIDGE and STREET, JJ., at Sandwich, on December 28th, 1891.

Osler, Q.C., for the petitioner.

Aylesworth, Q.C., for the respondent.

It appeared that an order for particulars had been made on November 13th, 1891, which required the same to be given at least 14 days before the trial, in default of which the petitioner was to be precluded from giving any

evidence, but that no particulars had been delivered. Counsel for the petitioner, however, stated at the opening of the Court that he had no evidence to offer, and counsel for the respondent asked for judgment dismissing the petition.

Thereupon *Wigle* applied upon notice served by him, pursuant to special leave obtained on December 26th, 1891, on behalf of one Darius Wigle, for leave to substitute the latter as petitioner in place of the present petitioner, Mr. Tofflemire; and contended that where no evidence was offered at the trial in respect to a petition, a new petitioner could be substituted by the Court. He added that if the Court thought a petitioner could be substituted upon material shewing that corrupt practices had been indulged in he could, if he had leave, obtain such.

STREET, J.:—You had 18 days in which to do that, and you have not done it. It is after the Court assembles here for the purpose of trying this petition that you proceed, and surely it is too late to ask for delay.

Wigle:—After receiving an intimation that the petition would not be carried on, I acted as best I could in the way of obtaining information; but it was very difficult to do so.

STREET, J.:—You might have got Mr. Tofflemire here, at all events.

Wigle:—If your Lordship dismisses this application, if there is power given to you, I would ask for leave to move in Toronto to renew this application to substitute a petitioner.

FALCONBRIDGE, J.:—Both my learned brother and myself have ruled, on other occasions, that we have no power to substitute a petitioner, except in certain cases, either where a day of trial was not fixed within the time prescribed by the statute, which is not this case, or where

notice of the withdrawal of the petition has been given by the petitioner, which is not this case. I do not see that it would advance you at all to give such leave, if we had power to give it, because no Judge in Toronto could do what you ask to have done.

The case has come down for trial, solemnly fixed in due course, with the proper notices given, and counsel, duly authorized by the petitioner, announces to us that he has no evidence in support of the petition.

An application is now made on behalf of a third person, Darius Wigle, to be allowed, in some way, to intervene, and carry on this enquiry. That application is supported, so far as appears before us, by some vague and general statements made on information and belief that there has been collusion in the dropping of the petition, and that corrupt practices have prevailed to some extent in the riding.

Against that we have the positive assurance of the counsel for the petitioner that there has been no collusion, or understanding or misunderstanding of any kind, in the matter, and counsel for the respondent assures us that there is no arrangement of any nature. Under those circumstances, especially in view of the fact, as I have already said, that we have no power here to substitute a petitioner, we do not feel called upon, in the interests of justice, to prolong the enquiry, and we think the petition ought to be dismissed with costs.

STREET, J.:—I quite agree with my learned brother in the result which he thinks should follow this application, for the reasons which he has given, as well as for those which I myself expressed during the discussion. I think that the application of Mr. Darius Wigle should not be entertained here, because no sufficient material has been produced in support of it. It is evident from the statement of Mr. Wigle, counsel for Mr. Darius Wigle here,

that the position of matters has been known to him since the 10th of this month. Although that is the case, now, on the 28th of the month, he is unable to give us anything to shew why a new petitioner should be allowed to intervene, except his own unsupported statement, on information and belief, that there has been collusion, and that corrupt practices have prevailed. Against that, as my learned brother says, we have the statement of both the counsel for the petitioner, and for the respondent, that no collusion has taken place.

Respondents in these cases, the sitting members, have rights, and those rights should be respected. This petition has been pending since last April, and neither the petitioner nor the person who is proposing to be substituted as petitioner, has been able to shew any good reason why the petition should any longer remain upon the files against him. If evidence of collusion between the petitioner and respondent had been given here, it would undoubtedly have been our duty to adjourn the inquiry, in order that a new petitioner might, if possible, be substituted, although the difficulty in the way of a substitution of that kind is very great; but, there being no such evidence, I think we have no course open but to dismiss the application, and dismiss the petition. The petition is dismissed with costs.

A. H. F. L.

KINGSTON.

PROVINCIAL ELECTION.

BEFORE OSLER, J. A., IN CHAMBERS.

TORONTO, *September 22nd, 1894.*

RICHARD VANALSTINE, *Petitioner,*

v.

WILLIAM HARTY, *Respondent.*

Cross Petition—Security for Costs.

Under sec. 13 of the Controverted Elections Act, R.S.O. 1887, ch. 10, security for costs is required only in the case of the original or principal petition, and not in that of a cross petition.

THIS was a motion by the respondent to set aside a cross-petition presented by one Vanalstine, complaining of unlawful and corrupt acts by the candidate, who was not returned. No security for costs was given with the cross-petition, and this was alleged as an irregularity.

E. F. Blake, for the respondent, contended that by sec. 13 of the Ontario Controverted Elections Act, security for costs was required upon the cross-petition as well as upon the original or principal petition.

J. Bicknell, for the cross-petitioner, contra.

OSLER, J.A.:—

Previous to the year 1874 there was no power to file a cross-petition for any purpose. The Act provided merely for the presentation of a petition against the sitting member to set aside the election and subsequent proceedings thereon or connected therewith.

The provisions as to security for costs were the same

as they now are except that by 39 Vict. ch. 10 sec. 39 (O.) 1876, the security was to be by deposit of $1,000.

These provisions, so far as they need here be noted, are found in sec. 13 of the Controverted Elections Act, R.S.O. 1887, ch. 10, which, under the heading "security for costs," enacts that at the time of "the prosecution" of the petition, or within three days thereafter, security shall be given on behalf of the petition for the payment of all costs, charges, and expenses that may become payable by the petitioner (*a*) to every person summoned as a witness on his behalf, or (*b*) to the member whose election or return is complained of.

This section was perfectly apt and proper in the case of a petition presented complaining of the undue return or undue election of the member. It is still the only case the section provides for, although the right to file a petition against the defeated candidate is now given by sec. 7 of the Act, which is now placed in the group of sections headed "presentation of petition."

That section was at first an isolated, independent enactment: sec. 1 of 38 Vict., ch. 3 (O.), 1874. It enacts that in case a petition is presented against the return of a member, the respondent, or any other person authorized by law to present an election petition, may, within 15 days after the service of a petition against the return, file a petition complaining of any unlawful and corrupt act by any candidate at the same election who was not returned, whether the seat is or is not claimed by him or on his behalf; and the trial of such petition shall take place at the same time as the trial of the petition against such member or respondent, or at such other time as may be appointed.

In the revision of the statutes this section now finds its place in the group already spoken of, headed "presentation of petition." It can hardly be disputed that had the question arisen prior to the petition, the contention would have been utterly without foundation.

There could have been no pretence for holding that a clause in the general Act requiring security to be given for the sitting member's costs on the presentation of a petition against his return applied to the case of a cross-petition authorized by the amending Act filed against the defeated candidate. The simple answer was that the Act had not provided for the latter case, as would have been at once manifest had it been attempted to give the security by recognizance. The revision has, in my opinion, made no difference. The security required is upon the presentation of a petition against the return of a member to secure the member's costs, not upon the filing of a cross-petition against one who is not the member, but the defeated candidate. It is not the deposit which is required, as the respondent contends, but the deposit as security, and the object of the security shows that it is not and cannot be required on a cross-petition, as it could never be made available by the respondent on such a petition.

Motion dismissed with costs to the petitioner in any event.

G. F. H.

WEST ALGOMA.

PROVINCIAL ELECTION.

BEFORE OSLER, J.A., IN CHAMBERS.

TORONTO, *September 3rd and 4th, 1894.*

JOHN GEORGE WHITACRE, *Petitioner,*

v.

JAMES M. SAVAGE, *Respondent.*

Petition—Service Out of Jurisdiction.

A petition to unseat a member may be duly served out of the jurisdiction of the Court; and it is not essential that an application should be made for leave to effect such service, or for allowing the service so made.

THIS was a motion made by the respondent to set aside the service of the petition herein, on the ground of its having been served upon him out of the jurisdiction.

C. Swabey, for the motion.

Aylesworth, Q.C., contra.

September 4th, 1894. OSLER, J.A.:—

The respondent moves to set aside the service of the petition, on the ground that it was made out of the jurisdiction, while at Winnipeg, where he happened to be during the brief period allowed by law for giving notice of the presentation of the petition.

I have found no case in the books in which the question of service of an election petition beyond the jurisdiction of the Court has been raised except the *Shelburne Case* (1887), 14 S.C.R. 258. There the petition in the Supreme Court of Nova Scotia was served on the sitting member at Ottawa, in Ontario, pursuant to an order

of Court giving leave to serve the petition out of the jurisdiction. The point was not decided, but two of the judges of the Supreme Court of Canada expressed an opinion that the judge of the Court below had power to make rules for service of a petition out of the jurisdiction.

In the case before us no application was made for leave to effect service in this manner, or to allow the service which was made as good service.

I am however of opinion that the respondent's objection fails.

What the Act requires (section 15) is that *notice* of the presentation of the petition with a copy of the petition should be served on the "respondent" within the prescribed time "as nearly as may be *in the manner* in which a writ of summons is served or in such other manner as may be prescribed."

The object of this is not to compel the respondent to come into Court or to appear, or to enable the petitioner to take further proceedings in the matter of the petition consequent upon his doing so. It is simply to give the respondent notice of its presentation, so that he may if he will, defend it. The Court takes and acquires no jurisdiction over his person by reason of the service, and does not by the petition or its service purport to make an order upon, or give any direction to the respondent. The case therefore differs in many respects from an ordinary action in which, apart from statute, the Court has no power to exercise jurisdiction over any one beyond the territorial limits over which its jurisdiction extends.

Actual notice having been given to the respondent by service upon him in the manner, or one manner, in which a writ of summons is served, viz., by personal service, which requires no confirmation or special order for its allowance, I think that is all that is necessary, and that notice of the presentation of the petition was well given. The object of the service is, in my opinion, only to give notice of

the proceedings, and the case of *Credits Gerundeuse (Limited)* v. *Van Weede* (1884), 12 Q.B.D. 171, where service of an interpleader summons out of the jurisdiction was held good, supports my contention, and so also does what is said by Lord Chelmsford and Turner, L.J., in *Drummond* v. *Drummond* (1866), L.R. 2 Ch. 32, 35; *Cookney* v. *Anderson* (1862), 31 Beav. 452, 468.

It is therefore unnecessary to consider the other answer made to the objection, viz., that by filing an appointment of an agent in the matter of the petition after the service had been made estops the respondent from now attacking the service.

The motion will therefore be dismissed with the usual costs.

G. F. H.

WEST WELLINGTON.

PROVINCIAL ELECTION.

BEFORE ROSE AND MACMAHON, JJ.

GUELPH—*January 15, 1895.*
TORONTO—*January 26, 1895.*

BEFORE THE COURT OF APPEAL.

Present:—HAGARTY, C.J.O., BURTON, OSLER, MACLENNAN, JJ.A.

TORONTO, *June 5 and 6 and October 29, 1895.*

THOMAS MCQUEEN, *Petitioner,*

v.

GEORGE TUCKER, *Respondent.*

Corrupt practices—Treating—Candidate—Corrupt intent—Habit.

The undisputed evidence shewed that the respondent from the time of his nomination as the candidate of his party frequently treated the electors and others in the bar-rooms of hotels whilst engaged in his canvass. He was not a man whose ordinary habit it was to treat, nor one who, in the course of his ordinary occupation, frequented bar-rooms:—

Held, OSLER, J.A., dissenting, that the trial Judges properly drew the inference that the treating was done with corrupt intent, so as to avoid the election of the respondent.

Remarks by BURTON, J.A., on the amendment to the Election Act, in respect to "the habit of treating," by 58 Vict. ch. 4, sec. 21 (O.)

THE election complained of was held on the 19th and 26th days of June, 1894. The candidates were the respondent and one Absalom Shades Allen. The respondent was declared by the returning officer to have been elected. The petition contained the usual charges of bribery and corrupt practices. Particulars were delivered in the regular way. The only charge contained in the particulars necessary to refer to for the purposes of the report was the following:—

14. In and about the month of June, 1894, at the various places hereinafter mentioned, the said respondent did, directly and indirectly, give and provide, or cause to be given and provided, and did pay wholly or in part the expense incurred for meat, drink, refreshment, or provision for the persons hereinafter named and others, in order to be elected, or for the purpose of corruptly influencing such persons to vote for the respondent, or to refrain from voting against the respondent, at such election. The places above referred to are, among others: Hyman's hotel, in the village of Glen Allan; Murner's hotel, in the village of Clifford; Boyle's hotel, at Drayton; Henry's hotel, at Clifford; Collison's hotel, at Harriston; Charles Armstrong's hotel, at Teviotdale; John Earl's hotel, at Yatton; Dowd's hotel, at Arthur; Wilson's hotel, in the town of Palmerston; Snider's hotel, in the village of Drayton; and other places to the petitioner unknown. The following electors, among others, are those with whom the offence is alleged to have been committed (naming and giving the place of abode of eighteen men.)

The following is a summary of the evidence given at the trial under charge 14:—

Robert Scott said he lived in the township of Minto, and was an elector in the West Wellington division; met Tucker at Henry's hotel, at Clifford, on the 27th December, 1893, and was introduced to him; Tucker was introduced as the Patron candidate; on that occasion Tucker treated fifteen or twenty people, of whom the witness was one, to drinks and cigars at the bar.

J. C. Henry said he kept a hotel at Clifford; Tucker stayed there sometimes; he first came there in December, 1893; he was introduced as the Patron candidate; on that occasion there was a good deal of treating, and Tucker paid for one treat; that was about the 27th December, 1893; he came there twice after that, once in April, 1894,

and again between nomination and polling; on the occasion in April there were a number of treats and Tucker paid for one, treating ten or twelve persons; he did not treat in June.

John Scott said he was one of those treated by Tucker in Henry's hotel at Clifford, one day in the second week of April, 1894; Tucker was introduced as the Patron candidate; eight or ten were present; politics were being discussed at the time; the next day the witness was called over by Tucker to Murner's hotel in the same village; he was introduced to Murner as the Patron candidate; only four persons were in this treat.

W. H. Scott said he lived in Clifford, and was present on the 27th December, 1893, on the occasion spoken of; treating was going on, there was quite a crowd, and they were all talking politics to one another; Tucker said he was the Patron canditate; he was talking politics when treating; twenty or twenty-five were present when a general treat was called by Tucker.

R. McWilliams said he lived at Drayton and knew Tucker; remembered seeing him in the Queen's hotel at Drayton after he had accepted the nomination of the Patrons, in January, 1894; Tucker treated ten or fifteen persons in the bar; they were discussing politics outside, and Tucker called them in; he was then being introduced as the Patron candidate; saw Tucker again in the same hotel shortly before nomination day; "quite a few" were present, discussing election matters; Tucker treated; there were electors present; Tucker was canvassing votes on both occasions; all the different parties in politics were represented among the persons met together on these occasions; witness himself was a Conservative, and a supporter of Allen, the other candidate.

Daniel Hambly said he met Tucker in O'Boyle's hotel in Drayton, in January, 1894, two or three times; on two of these occasions Tucker treated; the first time there

were six or seven present; the second only two or three; never saw him treat before or since the election.

Owen O'Boyle said he kept a hotel in Drayton, and knew Tucker; never saw him in the hotel before January, 1894; he was there on different occasions between that and election time; he treated twice; first, eight or ten persons, and second, three or four; they were general treats; he was there as Patron candidate; the first treat was in January, the second in April; had never seen him treat before that; did see him treat once since the election.

George Ross said he knew the Wilson hotel at Palmerston; saw Tucker there a couple of months before the election; he was talking politics; asking for support as a candidate; about five or six persons were present; Tucker was introduced as the Patron candidate, and treated once.

Ritchard Leitch, a voter in the township of Minto, said he remembered Tucker treating at the local election in Palmerston, Harriston, and so on; saw him between Christmas and New Year's day; met him after that and had a drink at his expense at Wilcox's hotel in Palmerston; three or four persons were present, talking about the election; met him in Clifford and had several treats; could not say who paid then.

Frank Heiman said he lived at Glen Allan and kept a hotel there at the time of the election; saw Tucker there before the election; there was a meeting at Glen Allan, and Tucker was there as candidate of the Patrons; Tucker took dinner at the hotel the day after the meeting; after dinner he came to the bar and paid his bill; there were four or five people in the bar, and he treated the boys after he settled his bill; he got acquainted with them and called them up; they knew he was the Patron candidate; some had votes.

George Wilson said he remembered seeing Tucker at Heiman's hotel before the election, on the 25th May or about that time; he came and met witness upon the road

outside the hotel, shook hands, and witness went in with him; Tucker did not treat; Heiman asked witness what he would have, and witness had a glass of beer; Tucker might have paid for it before or after, but witness did not see him do so; knew Tucker was the Patron candidate.

George Baldwin, a voter in the township of Peel, said he saw Tucker at Heiman's hotel before the election; could not say just when it was; could not say whether Tucker treated or not; there was treating while Tucker was there, and witness thought Tucker "called on the drinks;" knew Tucker was a candidate; there was no talk about the election; Tucker said "come up and have a cigar;" there may have been four or five present; never knew of Tucker treating before or since.

J. P. McMillan said he was boarding at Dowd's hotel in Arthur during the election; when Tucker came to that village he remained in that hotel; witness was present when treating was going on; had seen Tucker treating between the time he became a candidate and the election; he treated witness several times; witness remembered two occasions, both in May; about ten persons were present on each occasion; some were electors; knew in May that Tucker was a candidate.

Thomas Cummings said he was bar-tender in Dowd's hotel in Arthur during the election; saw Tucker there several times between the 11th May and the time of the election; Tucker was talking politics; saw Tucker in the bar; never saw him treat; "the boss" served drinks in the back room, when Tucker was there, and the drinks were paid for, but did not know who paid.

No witnesses were called for the respondent.

J. K. Kerr, Q.C., *E. F. B. Johnston*, Q.C., and *R. A. Grant*, for the petitioner.

Laidlaw, Q.C., and *J. Bicknell*, for the respondent.

ROSE, J. (at the conclusion of the argument):

The part of the case under this head is sufficiently clear; the evidence is abundantly strong. The scope and the intent of the statute and the law on the point may be expressed in the language that we find in Rogers on Elections, 16th ed., vol. 2, p. 325: "'The statute does not say that it shall depend on the amount of drink. The smallest quantity given *with the intention* will avoid the election. But when we are considering, as a matter of fact the evidence to see whether a sign of that intention does exist, we must, as a matter of common sense, see on what scale and to what extent it was done:' *per* Blackburn, J., *Wallingford Case* (1869), 1 O'M. & H. at p. 59; see also *Westbury Case* (1869), *ib.* 50, per Willes, J. 'Whenever also the intention is by such means to gain popularity, and thereby to affect the election, or if it be that persons are afraid if they do not provide entertainment and drink to secure the strong interest of the publicans, and of the persons who like drink whenever they can get it for nothing, they will become unpopular, and they, therefore, provide it in order to affect the election . . . then I think that it is corrupt treating:' *Wallingford, supra* at p. 59; *Mallow* (1870), 2 O'M. & H., at p. 22. And see *Louth* (1880), 3 O'M. & H. 161."

The language of the statute which requires consideration is: "No candidate shall corruptly, by himself or by or with any person, or by any other way or means on his behalf, at any time either before or during an election, directly or indirectly give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay wholly or in part any expenses incurred for any meat, drink, refreshment or provision to or for any person, in order to be elected, or for being elected, or for the purpose of corruptly influencing such person or any persons to give, or refrain from giving, his vote at the election:" R.S.O. 1887 ch. 9, sec. 154.

The words to be considered in connection with this charge are "in order to be elected."

We find that this candidate, starting out as a candidate to meet the electors, and in order to be elected, chose to treat and pay for drinks at the various bars in several villages and places in the electoral district. This was done not simply in good fellowship, but I take it for the direct purpose of advancing his candidature and securing votes. He was not a man whose business it was to go about visiting his fellows, and who had a habit of treating, or what might be called a habit. He was starting out for a particular purpose, and it is a significant fact, as stated by a witness, that in one place after treating at one hotel he desired to be introduced as a candidate at a hotel across the road, where he was not known before, and that he followed up the introduction by treating.

We have no contradiction of the statements made as to the fact of the treating, the manner of treating, and the position in which he placed himself before those he was treating.

He appeared at these places simply and solely for the purpose of advancing his election and securing votes, and I think we should be forgetful of the evidence and the effect of the evidence, if we should find the fact to be other than it appears to me, namely, that for the purpose of being elected and to advance his candidature during the election, and secure votes, he did corruptly give and pay for drink and refreshments. Speaking for myself I think the charge has been sustained, the candidate has been guilty of a corrupt practice, and the election, therefore, should be voided.

MacMahon, J.:—

I entirely concur with what my learned brother has stated. It is a totally different case from the *East Middle-*

sex Case (1883-4), 1 Elec. Cas. 250, or the *North Middlesex Case* (1875), H.E.C. 376. In the latter case the successful candidate was a drover. His practice was almost universal as to treating. It appeared in that case that, although considerable treating was done by him during the time he was a candidate, it in no way exceeded what he had been accustomed to do prior to his candidature and while carrying on his usual business of drover and cattle dealer. It was pointed out in that case, that the position which he held as a cattle dealer almost necessitated his treating when he went to fairs and other places. The Court came to the conclusion that the treating not being in excess of what was his custom, it could not be safely said he was guilty of a corrupt act, or was doing what he did to influence the election.

Here, as already stated by my learned brother, the candidate, the respondent, was a farmer. He had not been accustomed to treat, had not been accustomed to visit places where treating was going on; and, as appears by the evidence, he was never known to treat before his nomination by the Patrons as their candidate. One cannot look at the number of occasions and the people who participated in his hospitality in that way from the very inception of his canvass, without reaching the conclusion that he was treating, and corruptly treating, for the purpose of influencing the electors in the election, and to secure their votes.

I think he is guilty of a corrupt practice, and the election for that reason must be voided.

The respondent appealed.

Robinson, Q.C., and *Laidlaw*, Q.C., for the appellant. The treating was before the issue of the writ for the election, and therefore is not within the Act at all. The petitioner must shew that the treating was so unusual as to lead to an inference that the intent was wrongful;

mere customary treating is not enough: *North Ontario Case* (1884), 1 Elec. Cas. 1; *Aylesbury Case* (1886), 4 O'M. & H. 59; *Norwich Case* (1886), *ib.* at p. 91; *Jacques Cartier Case* (1878), 2 S.C.R. at p. 246; *Rochester Case* (1892), 4 O'M. & H. 156. There must be the corrupt intent: *South Norfolk Case* (1875), H.E.C. at p. 669; *North Middlesex Case, ib.* at p. 382; *Glengarry Case* (1871), *ib.* 8; *Kingston Case* (1874), *ib.* at p. 635; *London Case* (1875), *ib.* 214; *East Elgin Case* (1879), *ib.* at p. 772; *Welland Case* (1871), *ib.* 47. There must be something of profusion or extravagance, and something to shew solicitation. There were no unusual or suspicious circumstances in this case.

J. K. Kerr, Q.C., *E. F. B. Johnston*, Q.C., and *R. A. Grant*, for the petitioner. The enactment now in force is different from that in question in several of the cases cited, and differs also from the English Act, which is wider as to the persons included; but our Act is much wider as to the time and nature of the offence. The appellant was clearly a candidate within the meaning of the section at the time the treating was done: Rogers on Elections, 16th ed., vol. 2, p. 289; *Sligo Case* (1869), 1 O'M. & H. 300; *Stroud Case* (1874), 2 O'M. & H. 179. An act committed with intent is fatal, no matter at what time done: *Youghal Case* (1869), 1 O'M. & H. 291. The evidence shews the candidate's intention to ingratiate himself with the electors, and that makes the act corrupt within the meaning of the section: Rogers, 16th ed., vol. 2, p. 325. "Corruptly" has been defined to mean "with the intention of producing an effect upon the election:" *Wallingford Case*, 1 O'M. & H. at p. 59: see also *North Norfolk Case* (1869), *ib.* at p. 242; *Mallow Case*, 2 O'M. & H. at p. 22; *Louth Case*, 3 O'M. & H. 161; *Hereford Case* (1869), 1 O'M. & H. 194; *Carrickfergus Case* (1880), 1 O'M. & H. at p. 91; *Bodmin Case* (1869), 1 O'M. & H. 117. Where the drink is given at a time when there is no other pur-

pose in view, the inference must be drawn that there was the intention. This man was, besides, not in the habit of drinking or treating; it was a complete change from his ordinary habits. There are direct findings of fact by the trial Judges which should not be interfered with. It was not the kind of treating which arises merely from good-fellowship. The electors were treated in large numbers and indiscriminately. The change of conduct after the issue of the writ is a circumstance that goes to shew the appellant's own idea of the impropriety of his conduct.

Robinson, in reply. It is not a mere question of whether there is evidence to support the finding. The Court is bound to consider the evidence for itself: *North Perth Case* (1892), 20 S.C.R. 331. The possibility of any vote being influenced by the treating has not been shewn.

Cur. adv. vult.

October 29, 1895. HAGARTY, C.J.O.:—

This is an appeal from the judgment of my learned brothers Rose and MacMahon, before whom a petition against the return of the defendant Tucker as member of the Legislative Assembly for West Wellington was tried. The election was held void on the ground of corrupt treating, consisting of various acts of the respondent in paying for drinks for persons in different hotels or drinking places. A large amount of evidence was produced by the petitioner to prove his case. The respondent called no witnesses as to the treating charge, No. 14. But his examination for discovery, with over 1200 questions, was put in. It does not throw much light on the treating question.

I think it better to give my learned brothers' judgments on this treating question.

[The Chief Justice read the judgments, and continued:]

This case has been very fully and very ably argued before us in appeal from this judgment, and all the cases bearing on the subject of corrupt treating in England and here have been cited and discussed.

I have examined the evidence on which the judgment proceeded with much care and with a due regard to the serious effect of the judgment as to the respondent.

I find great difficulty in accepting the appellant's argument that there is no evidence to warrant the finding that the treating was corrupt. I fully agree that "corrupt" is the "key note," as it has been called, of the penal consequence of the act.

The statute, in its laudable endeavour to secure purity of elections, prohibits the doing of certain acts. We are all aware of the gross mischief and expense incurred at no very distant period in the furnishing of meat and drink by candidates or their agents. The Legislature declares that the act must be done corruptly—that is, with a corrupt intent. The existence or the non-existence of such intent has been usually the great contest in every case in which "treating" has been proved.

There is a very full summary of cases up to 1880 in the *Louth Case*, 3 O'M. & H. at p. 163. One great Judge said that the word "corruptly" means "with the object and intention of doing that thing which the statute intends to forbid;" another, "with the intention of producing an effect upon the election;" again, "for the purpose of being elected, with an intention to produce an effect upon the election. . . . I think whenever the intention is to gain popularity and thereby to affect the election;" again, "the man who gives drink, if he gives it because he is afraid of becoming unpopular, and therefore practises it in order to affect the election, then it is corrupt treating."

The subject is discussed in Leigh & Le Marchant's Guide to Election Law, 4th ed., p. 26, and in Rogers on Elections, 15th ed., vol. 2, p. 784.

There was evidence before the Judges from which, uncontradicted, they might fairly draw the inference that the various acts of treating by the respondent were done with a view of influencing the election in his favour—to further his election—to gain popularity, and thereby affect the election, etc., etc.; and therefore the *primâ facie* conclusion that the acts were done with a corrupt intent.

There was no rebutting testimony to the effect that this habit of treating persons present in bar-rooms was an ordinary custom of the respondent, generally adopted by him, and not assumed as soon as he began to appear in public places as a candidate for Legislative honours. If this had been found, it would, doubtless, have been a strong argument against drawing the conclusion that his intent was corrupt in the sense established by the election cases here and in the old country.

As my brother Rose points out in his judgment, it seems impossible on the evidence to look on his acts of treating as matters unconnected with his candidature. I cannot look upon them in any other light than that in which the trial Judges regarded them.

The evil is serious—the Legislature has striven, within reasonable limits, to put an end to it.

I am of opinion, on the whole, that there is no ground for our interference.

BURTON, J.A.:—

The learned Judges who tried this case were quite alive to the fact that in order to bring the case within the statute it was absolutely necessary to establish that the treating was done corruptly, in order to be elected, and that the motive influencing such an act had to be proved and established beyond all reasonable doubt.

It being then a question of intention that had to be ascertained, as all questions of intention must (to quote

the language of a very eminent Judge), by looking at the outward acts of the parties and seeing their degree and extent, and then drawing the conclusion—and that conclusion could only be properly arrived at on a considerasion of the whole of the evidence.

It is perfectly manifest, unless a change has been effected by the recent amendment to the Election Act,* hat mere treating during the election, under the section in question, cannot be regarded as a violation of it, unless it is done corruptly with the intention of influencing the elector in order that the candidate whose agent he is may be elected—and it would be very much to be regretted if the law were construed otherwise.

There was abundant evidence in this case to warrant the conclusion at which the learned Judges arrived, and I think it impossible to say that they were wrong, and their judgment, therefore, ought to be affirmed.

Since the trial the law has been amended by a clause which may prove rather difficult of interpretation. No Court or Judge has ever held that it was a sufficient answer to a charge of treating electors, that the person charged had been in the habit of treating, although proof of such a habit has always been considered as pertinent evidence to be taken into consideration with the other facts of the case in coming to a conclusion as to whether the treating was done corruptly with the view of influencing the vote of the elector—in the same way as it would be pertinent to shew that the elector was a warm supporter of the candidate and needed no such stimulus.

If an amendment to the existing law was considered necessary, it seems to me it would have been much more equitable to have provided, as has been done in England, that, during certain days, treating, though not corrupt,

* 58 Vict. ch. 4, sec. 21—It shall not, upon the trial of an election petition, be a sufficient answer to a charge of treating electors that the person charged had been in the habit of treating.

should be illegal, subjecting the party to a penalty—but not sufficient to avoid an election.

Mr. Justice MacMahon has pointed out in his judgment that the habit of the candidate in the case referred to was merely a piece of evidence which tended to negative the corrupt intent; and that, I trust, is still the law.

MACLENNAN, J.A., concurred.

OSLER, J.A.:—

I am unable to come to the same conclusion. The case turns entirely upon the inference to be drawn from the undisputed evidence, and not upon any question of credibility, and it is now the province of this Court to pass upon the evidence and to determine for themselves what is proved by it. In doing so we ought not to disregard the serious consequences which will result to the defendant from an adverse finding, and if the evidence fairly admits of a lenient view being taken, we should give him the benefit of it. For my own part, I am of opinion that, having regard to the time at which and the manner in which the treating was done, and to the well-known custom of the country in regard to treating, a corrupt intent cannot properly be inferred.

I think that the appeal should be allowed and that the cross-appeal should be dismissed.

Appeal dismissed; OSLER, J.A., *dissenting.*

E. B. B.

SOUTH RIDING, COUNTY OF PERTH.

PROVINCIAL ELECTION.

BEFORE BURTON AND OSLER, JJ.A.

MITCHELL, *January 30th.*
February 2nd and 7th, 1895.
STRATFORD, *February 8th, 1895.*
TORONTO, *March 2nd, 1895.*

WILLIAM MALCOLM, *Petitioner,*
v.
JOHN MCNEILL, *Respondent,*

Aliens—Non-residents—Voting without right—Actual knowledge—Agency—Evidence—R. S. O. 1887, c. 9, s. 160.

Actual knowledge on the part of a voter that he has no right to vote is necessary to constitute a corrupt practice under R. S. O. 1887, c. 9, s. 160.
Evidence to establish agency discussed and found insufficient.

THIS was a petition by William Malcolm under the Ontario Controverted Elections Act, R.S.O. 1887, ch. 10, in respect to the election of a member of the Legislative Assembly for the electoral district of the South Riding of the county of Perth, on June 19th and 26th, 1894.

Amongst other charges of corrupt practices referred to in the petition and specified in the particulars, were several charges under sections 160 of the Ontario Election Act, R.S.O. 1887, c. 9 in respect to persons alleged to be agents of the respondent John McNeill, the member elect, who voted or induced or procured persons to vote at the election knowing that they or such persons so induced or procured had no right to vote, the particular disqualifications referred to being either non-residence or alienage under sec. 7 of the Act.

The trial commenced at Mitchell on January 30th, 1895, and continued on February 2nd and 7th, when it was adjourned to Stratford.

Osler, Q.C., for the petitioner.

Aylesworth, Q.C., for the respondent.

In the course of the trial the following judgments were delivered at Mitchell:—

BURTON, J.A.:—

In reference to these charges that affect a large number of persons who were residents of the district at the time of the voting, and also a number of aliens, we are of opinion that actual knowledge of the facts disentitling the voters to vote must be established, although at first I entertained a different opinion. It is not sufficient to rely on the knowledge which the law will in many cases impute to parties under such circumstances. In other words, in construing sec. 160 of the Election Act, R.S.O. 1887, c. 9, "knowing he has no right to vote" must mean that the party has actual knowledge that he has no right to vote. It has puzzled me a good deal, I must confess, and it is only recently I have come to the conclusion that that is the proper interpretation of the statute. If we are wrong, we have the satisfaction of knowing that another Court, having more leisure and opportunity to consult the authorities, can set us right. In this case where many parties—respectable men, respected by the community among whom they have lived for years and voted for years—voted under the impression that they had a right to vote, it would be a monstrous thing, it seems to me, that they should be found guilty of a corrupt practice merely because the law would impute notice to them, thus placing them in the same category (I was going to say as criminals, and I do not withdraw the word) with persons guilty of the petty offence of receiving a few cents for

their votes. There is the additional reason that the parties are made liable to a penalty of $100. It seems to illustrate how shocking it would be if persons, like some of these respectable men, could be sued for a penalty of $100 when they had no intention of infringing the law. We have come to the conclusion in this case that there must be actual knowledge, before a party can be found guilty of a corrupt practice, of his not being entitled to vote, a very different thing from imputing guilt to parties who are innocent of any intention to do wrong. To constitute such a practice a wilful illegal voting with knowledge is, in my opinion, necessary. It is scarcely necessary to say that all these votes are illegal, and would be struck off on a scrutiny.

OSLER, J.A. :—

I concur in the judgment of my brother Burton.

The charges of corrupt practices we dispose of this morning are those under sec. 160 of the Election Act against persons, who are agents of the respondent's, voting or inducing other persons to vote knowing that they had no right to vote at the election, the particular disqualification being either non-residence, under sec. 7 of the Act, or alienage. In all these cases there was the *primâ facie* right to vote, the name of the voter being duly entered on the voters' list.

Section 7, however, defines the qualifications of those who may vote; and among others, the voter must of course be a subject of Her Majesty by birth or naturalization. He must also be "not otherwise by law prevented from voting," and therefore he is not entitled to vote if he has not resided within the electoral district for the time and in the manner therein provided before the election.

Now, in the cases we are considering, the votes may be said to have been undoubtedly bad on one or other of these

two grounds, non-residence or alienage, and where the voters were members of the order of Patrons of Industry, I think it would not be difficult under the facts in evidence to hold that each voter was an agent of the respondent. But the question is whether a corrupt practice was made out. The vote was in every instance received without objection, and without requiring the voter to take the oath, and I find as a fact that in every instance the voter cast his vote in good faith, believing that he was entitled to vote and in ignorance that by law he was disqualified. Now, if sec. 160 had said that every person who votes, not being legally entitled to do so, shall be guilty of a corrupt practice and liable to a penalty, his innocent ignorance of his disqualification would be of no avail. But the language of the sentence is, "knowing that he has no right to vote." Under that form of expression it is to my mind perfectly plain, and it is the view I have always held, that what the statute requires to be proved is actual knowledge by the voter that he was doing something that is forbidden, not merely proof that the vote is bad and that the voter knows the facts which in law make it so, but that the voter knew he was casting it without having the right to do so. He may have known the facts, but unless he knew also that they disqualified him—knew that he was doing wrong in voting—he was not guilty of a corrupt practice. The very object of the oath is to clearly bring home to the mind of the voter the facts he must swear to—the facts which must exist in order to qualify him. If he takes a false oath, there will probably not be much difficulty in bringing him within the section.

What I have said applies as well to the case of one who induces or requests a person on the voters' list to vote. He must know that such person had no right to vote, or it may be enough that he should persuade him to take or insist upon his taking the voters' oath when reluctant to do so, or when he would not have taken it but for such persuasion.

As to the alienage cases, it would strike one's sense of justice with a shock to be obliged to hold that such people as came before us yesterday were guilty of a corrupt practice or liable to a penalty of $100 for voting. Many of them were natives of Hanover, who were under the belief that, as such, they were British subjects, some of them having been so advised many years ago, and all of them having voted at previous Parliamentary and municipal elections without objection. As late as the year 1886 the question of the right of Hanoverians, born before and after Her Majesty's accession, to vote was raised in the Stepney Election Petition (1886), 17 Q.B.D. 54, and determined after argument of a special case, and it was held in an elaborate judgment, delivered by the late Lord Coleridge, L.C.J., that on the severance of the Crowns of the two kingdoms at the accession of Her Majesty to the English throne, Hanoverians, though resident in the United Kingdom, became aliens, and as such, were not entitled to vote. The ignorance of the voters in the present case of their legal position (I speak here of the Hanoverians) would, in my opinion, have made it impossible to hold them guilty of a corrupt practice even had they taken the oath. The section admits of the milder construction, and that construction we give it.

I must add that, in thus deciding, we are not differing from anything which was actually decided in the Hamilton case, (1891, 1 E.C. 499) in which, as I read it, the trial Judges found actual knowledge—guilty knowledge—on the part of the persons charged with inducing the aliens to vote. They found that it was a scheme on the part of these persons to procure the aliens to vote, knowing that they had no right to do so.

Our decision is open to review, and we think, having in view the future conduct of the case and the large number of similar charges to be made the subject of enquiry, that it is proper to express our opinion this

morning as to the construction of the section, it being one which we are not likely to recede from.

Charge 46 and similar charges are therefore dismissed.

Amongst the other charges in the particulars, number 73 charged one James Dougherty, alleged to be an agent of the respondent, with hiring a horse and buggy for one Charles Sholtz to convey voters in Mitchell to or near or from the neighbourhood of the poll at the said election.

In respect to this charge the following judgment was delivered at Toronto :—

OSLER, J.A. :—

We have already determined in this case, on charge No. 46 in the particulars, that the petitioner has failed to establish a corrupt practice in respect of those persons, agents of the respondent, who, being aliens, voted at the election. We held that to make this a corrupt practice within the 160th section of the Controverted Elections Act, it must be proved that the person so voting knew that he was not entitled to vote. In all the cases of aliens, evidence of this was wanting. There seems no reason to doubt that there had long been a general impression that persons who had lived in the country for many years, and who had voted at former Parliamentary and municipal elections without objection, were entitled to vote, and that the necessity for naturalization had not occurred to them.

In no case does it appear that the oath was tendered to the voter, whereby his disqualification might have been called to his attention; and, if necessary, I find as a fact that in every case which was brought before us, the voter voted in good faith, believing himself entitled to do so.

The same ruling was made in cases in which the vote might have been objected to, and was bad under the 7th section of the Election Act, R.S.O. c. 9, by reason of non-residence. The oath was not put to the voter, and in the

absence of the information which would be conveyed to his mind by the reading over to him of the oath, it was most natural that he should believe himself entitled to vote, finding his name on the voters' list. In all cases of this kind, also, I saw no reason to suppose that the voter was acting otherwise than in good faith and not knowing that he was not entitled to vote.

The only case on which judgment was reserved was one opened at the conclusion of the sitting of the Court at Mitchell, and closed at its adjourned sitting at Stratford on the 7th ult. This was a charge, No. 73 in the particulars, of hiring teams by one Dougherty, an agent of the respondent, for the conveyance of a voter to the poll.

It was proved that Dougherty did hire a team on the polling day for the purpose of conveying a voter to the poll, and that it was used for that purpose. The only question seriously in dispute was in regard to his agency. He was not a member of the Protestant Protective Association or of the Patrons of Industry. Had he been, I should have been disposed to think that agency was made out, having regard to the position taken by those bodies with reference to the respondent's candidature and to their own internal regulations which went far to make it compulsory upon their members to support the candidate of their choice. Dougherty was president of the local Conservative Association for Mitchell, and after Race, who was a candidate in the Liberal interest—though an opponent of Ballantine, the party nominee—had withdrawn, he canvassed two or three votes in the interest of McNeill, to whom also he gave his support—more, I think, because he desired Ballantine's defeat than because he wished McNeill to be elected. There was one interview or meeting between himself and McNeill during the campaign, but it is not shewn clearly either that McNeill himself or any accredited agent of his knew that Dougherty was working for him or canvassing. The fact that McNeill was not called as a

witness on this point has caused a good deal of hesitation in my mind, for there can be no doubt that he relied on having the support, *i.e.*, the votes, of the Conservatives who, as between himself and Ballantine, would like to see the latter defeated. But there was no Conservative committee, nor do I find that Dougherty or other members of that party attended the respondent's committee, loosely organized as that body was. Apart from the evidence of Boyle, which, if accepted in its entirety, would bring agency home very closely, there is nothing tangible except the isolated acts of canvassing two or perhaps three voters. Boyle's evidence is contradicted by Dougherty, and that is all I can say about it, for they both seemed to me to be equally respectable men. I have not overlooked the fact that Dougherty seemed to know where to send a person to obtain a scrutineer's authority, and it was fairly argued that this was a strong indication under the circumstances that he was more in the confidence and counsels of the respondent's party than he was willing to admit, and there has undoubtedly been displayed the most astonishing forgetfulness or ignorance on the part of Dougherty and others of facts which it might be thought they would have been familiar with. There is much to raise a case of suspicion, but in a question of imputed agency the facts ought to be such as lead one to a not doubtful inference. I think they stop short of that in the present case. All the other charges have failed after a prolonged and exhaustive enquiry. The election appears to me to have been conducted fairly, and to be as free from the imputation of corrupt practices as any that I have ever tried. I think there is nothing in any other part of the case which requires us to press the evidence against the respondent on this charge. If we found it proved, we should not avoid the election on that account, and I am therefore, on the whole, in favour of leaving it to share the fate of the

other 250 charges, by dismissing it. Dismissing it, we dismiss the petition, and think it ought to be with costs.

BURTON, J.A., concurred.*

* The train conveying the Judges, officials, and counsel on their return, on February 8th, 1895, to Toronto after the above trial, was run into by another, and the Registrar, Mr. Frank Joseph, and the reporter, Mr. J. S. Monaghan, were killed, and many of the records of the proceedings lost in the fire which resulted from the collision.—Rep.

A. H. F. L.

WEST ELGIN. (No. 1.)

PROVINCIAL ELECTION.

BEFORE MR. JUSTICE MACLENNAN.

TORONTO, *March 19, 1898.*
April 12, 1898.

Ballot papers—Marking of—Division of—Portion removed—Marking same.

If a ballot is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a compliance with the provisions of the Act, according to any fair and reasonable construction of it, the vote should be allowed :—

Held, that the dividing lines on the ballot between the names of the candidates, and not the lines between the numbers and the names, indicate the divisions within which the voter's cross should be placed, and the space containing the number is part of the division of the ballot containing the candidate's name, and that votes marked by a cross to the left of the lines between the numbers and the names were good.

Held, also, that a ballot, from which a portion of the blank part on the right-hand side had been removed, leaving all the printed matter except a portion of the lines separating the names, but which was properly marked by the voter, was good.

Held, also, that ballots marked for both candidates ; and a ballot marked on the back, although over a candidate's name, were properly rejected.

Held, also, that certain ballots with other marks on them besides the cross were good or bad under the circumstances of each case set out in the report.

Held, also, that a ballot, having the name of a candidate marked on its face in pencil, in addition to being properly marked for that candidate, was good ; that a ballot with two initials on the back as well as those of the deputy returning officer was good ; that a ballot with the name of a voter on the back was bad ; and that ballots with certain peculiar crosses marked thereon were good.

THIS was an appeal from the county judge of the County of Elgin, on a recount of ballots. The facts appear in the judgment.

Aylesworth, Q.C., and *E. F. B. Johnston*, Q.C., for MacNish, one of the candidates.

Wallace Nesbitt and *T. W. Crothers* for MacDiarmid, the other candidate.

MACLENNAN, J.A.:—

Appeal from a recount of votes before Ermatinger, County Judge.

The learned County Judge found the votes duly cast for the two candidates to be equal.

His decision with respect to forty seven votes was objected to before me.

Twenty of these depend on the same question. The form of ballot used was identical with that in the schedule of the Election Act, except that a scroll about one-eighth of an inch wide was used, instead of the plain lines running from left to right in the form.

The upright lines separating the numbers from the names were thin plain lines, similar to those in the form, and bore the same colours as the names of the candidates respectively.

	MACDIARMID,
1	FINLAY MACDAIRMID, of the Township of Aldboro, in the County of Elgin, Farmer.
	MACNISH,
2	DONALD MACNISH, of the Township of Southwold, in the County of Elgin, Farmer.

Fifteen of these twenty ballots were marked in the division containing MacDiarmid's number, to the left of the line separating the number from the name, and the other five were similarly marked in the division containing MacNish's number.

They were all counted by the learned Judge, and his decision is objected to on behalf of MacNish.

The ground of objection is that not being marked in the division containing the name, they are void, as not complying with section 103 of the Act, which directs that the cross be placed by the voter on the right-hand side, opposite the name of the candidate for whom he desires to vote, or at any other place within the division which contains the name of such candidate.

The question does not concern the right to vote, but only the proper method of doing so.

The Legislature has given certain directions for marking the ballot. They are intended for all classes of voters, including some who are not accustomed to the use of paper and pencil, and some who are dull and unintelligent, and yet who have as good a right to vote as the most intelligent.

Therefore, if a ballot is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a compliance with the provisions of the Act, according to any fair and reasonable construction of it, the vote ought to be allowed. I think that is the result of the authorities both here and in England. *Cirencester Division of the County of Gloucester* (1893), 4 O'M. & H. at p. 196; *Woodward* v. *Sarsons* (1875), L. R. 10 C.P. 733; *In re Thornbury Division of Gloucestershire Election Petition* (1886), 16 Q.B.D. at p. 746; *Phillips* v. *Goff* (1886), 17 Q.B.D. 805; *North Victoria, H.E.C.* at p. 680; *Hawkins* v. *Smith* (1884), 8 S.C.R. 676 (*Bothwell Election Case*). In the present case the question is whether twenty persons, who had an

undoubted right to vote, and who desired and intended and endeavoured to do so, have nevertheless failed in their attempt.

There are two methods of marking the ballot allowed by section 103. The cross may be placed at the right-hand side, opposite to the name of the candidate intended to be voted for, or it may be placed in any other place, within the division containing his name. There are really not two alternative methods, because the second method includes the first. Are these ballots marked within the division containing a candidate's name ? If we say, looking at the ballot which was here used, that the name of the candidate is in one division and his number in another, then these marks are not in the division containing the name, but in that containing the number. But I think it clear that these are not the divisions intended by the statute. The dividing line between the name and the number is not essential. There is no need whatever for a separating line between a candidate's name and his number, and the ballot would be perfectly good without it. Sec. 69, sub.-sec. 2, requires the names to be arranged alphabetically on the ballot; and sub.-sec. 3 directs the number and name of each to be printed in ink of different colours: therefore, the number is something belonging to the candidate, and not something distinct. There is no direction where the number is to be placed, and it might be placed anywhere near the name, before or after it, or above or under it. It is different with the names of the candidates: they must be separated from each other. Each must have a separate part of the ballot paper for itself, and must therefore be in a separate division. Accordingly, we find the form in the schedule divided by lines drawn from right to left, with as many divisions as there are candidates.

I think those are the divisions intended by the statute, and that the divisions containing the numbers are mere subdivisions of the divisions containing the names. In

other words, it is the same division of the ballot paper which contains each candidate's name and number.

It would be a strange construction of the statute which would hold that on a ballot from which the immaterial and useless upright lines were omitted, a cross near the number, or even to the left of it, would be good, as it clearly would be, but that on a ballot containing those lines a cross so placed would be bad. And yet a ballot in either form would be good, and might be used with propriety in any election. I think a construction leading to such a result ought not to be adopted, if it can be avoided.

In my opinion there is a very plain sense in which, notwithstanding the upright line, the space containing the number may be regarded as a part of the division of the ballot containing the candidate's name, and therefore I am bound to hold that it is so, and to affirm the validity of ballots marked within that space. I therefore think the learned Judge's decision was quite right, and that those twenty ballots were properly allowed and counted by him.

There is another ballot, No. 117, which was rejected both by the deputy returning officer and by the learned Judge, presumably on account of having a considerable portion of the blank part on the right hand side removed, a section of equal width from top to bottom, and about three-tenths of the whole width of the original paper. The part removed had none of the printed matter of the ballot upon it, except perhaps a portion of the lines from left to right, separating the names of the candidates. In other respects this ballot is perfect, and properly marked for MacDiarmid. The argument, which was strongly urged against its allowance, was that the voter might carry away with him the part removed, and use it to shew that he had voted for MacDiarmid.

I have hesitated a great deal over this ballot, but upon the whole I do not think there is anything in the Act requiring me to reject it. Section 112 (3) requires

ballots to be rejected on which anything in addition to the printed number, and the deputy returning officer's name or initials, is written or marked, by which the voter can be identified. There is nothing of that kind here, and I do not feel at liberty to extend the language of the Legislature, so as to include such a case as this within the prohibition, and thereby to disfranchise the voter who has in every respect marked his ballot distinctly and properly: *In re Thornbury Division of Gloucestershire Election Petition* (1886), 16 Q.B.D. at p. 753. Sec. 103 requires the voter to mark and to fold and to return to the deputy returning officer, the very ballot paper which has been given to him, and, by sec. 105, no person who has received one is to take it away out of the polling place.

It might be argued that he is required to return the whole ballot paper, and not merely a part of it, and that the prohibition of taking it away extends to every part of the paper. It may perhaps be inferred from the fact that the deputy returning officer refused to count the vote, that he did so because he knew he had not given out any ballot paper so much smaller than all the others as this, and therefore that it was the voter who had torn or cut a piece off it. But for that, it would be an assumption that there had been any part removed, or if there had, that it had been done by the voter, or that it had not been in that condition when given to him. It is still a perfect ballot, properly marked, and it is only by comparison with the other ballot papers that the inference can be drawn that any part of it had been removed.

Now, sec. 109 seems to be very material to this question. That provides for the case of a voter spoiling his paper, and it is only when it has been dealt with so "that it cannot be conveniently used as a ballot paper," that it is spoiled and ought to be delivered up and a new one procured.

This voter may, by inadvertence, have marked it wrongly in the first place, and immediately perceiving that, may have torn or cut off the margin on which he had placed his mark. He then finds that it can still be conveniently used as a ballot paper, and he does make use of it. I think sec. 109 warrants the conclusion that he might do so.

This ballot is not like that which was before my brother Osler in the West Huron case,* in which a part was torn off, and which was disallowed by him. In that case the part torn off was an essential part of the ballot paper, namely, that on which the printed number had been.

I think the proper conclusion is that this ballot ought not to have been rejected, and ought to be counted for MacDiarmid.

Eight ballots were questioned which appeared to be marked for both candidates, Nos. 38, 7070, 8573, 8412, 8509, 8560, 8566, and 8468. The learned Judge rejected the first seven as void, and allowed the last for MacDiarmid. I think he was right as to all but the last; and as to those I affirm his decision. But I think he ought to have disallowed No. 8468 as well as the others, and for the same reason.

No. 8519 was marked on the back over MacNish's name. I think it was rightly disallowed: *South Wentworth* (1879), *H.E.C.* at p. 536.

Nine ballots were questioned as having other marks thereon besides the proper cross. These were Nos. 732, 3484, 3946, 4858, 5350, 6564, 7735, 8508, and 8491. I think 732 was properly allowed for MacNish. 3484 was well marked for MacDiarmid, whose name was uppermost on the paper, and there were, besides the proper mark, two other small crosses near the upper margin of the paper outside of the line. It was disallowed by the learned Judge, but I think that was wrong, and that it should be allowed for MacDiarmid.

*Post p. 58.

3946 and 4858 were both marked for MacDiarmid, but there was a straight stroke on MacNish's division. The learned Judge disallowed them, but I think wrongly; they should be allowed for MacDiarmid.

5350 was well marked for MacNish, but in MacDiarmid's field there was also a cross, but carefully obliterated with a pencil. I think it was rightly allowed for MacNish by the learned Judge.

6564 and 7735 were allowed, the first for MacDiarmid and the other for MacNish, and I think rightly.

8508 was well marked for MacDiarmid, but with two obscure lines opposite to MacNish's name, lying very close together, almost coincident. It was counted by the deputy returning officer, but rejected by the learned Judge. I cannot say the lines do not cross each other, and therefore I cannot disturb his finding.

No. 8491 is like the last in every respect, and was rejected both by the deputy returning officer and the learned Judge. I cannot say they were wrong.

Four ballots were questioned for having names or initials upon them other than those of the deputy returning officer

No. 1306 has the name, "MacNish," on the face in pencil in that candidate's division, as well as a proper cross. It was rejected by the learned Judge. I think it should have been allowed. I am unable to see how the voter *could* (not might possibly) thereby be identified. *Cirencester* (1893) 4 O'M. & H. 196 per Hawkins, J.

No. 7369 was well marked for MacNish, but the words "Mr. MacNish, West Elgin," in pencil on the back. I think it was properly allowed by the learned Judge.

No. 7509 was properly marked for MacNish, and had the initials, "D. F.," on the back, as well as those of the deputy returning officer. It was allowed by both the deputy returning officer and the learned Judge, and I think rightly.

No. 7582 was properly marked for MacDiarmid, but had the name, "John Cains," in pencil on the back, besides the initials of the deputy returning officer. It was rejected by both the deputy returning officer and the learned Judge. It may have been because there was a voter of that name on the list. I cannot say it was not rightly rejected.

There were three cases of alleged imperfect and doubtful crosses. Of these, 5867 and 7165 were, I think, rightly allowed for MacNish. The first was a sprawling sort of a cross, but a cross nevertheless. The other was a cross, one of the lines being indistinct at and for a very short distance on both sides of the intersection, but still quite visible.

No. 6145 was an unusually large cross, the arms extending into MacDiarmid's field, but the intersection wholly within MacNish's division. It was rejected both by the deputy returning officer and the learned Judge. I think it should have been counted for MacNish.

The remaining ballot is No. 8176. The learned Judge thinks this ballot was found in the spoiled ballots envelope, but he says that looking at the ballot paper account and all the documents which were before him, he thinks it was placed in a wrong envelope by mistake, and he allowed it. It is well marked for MacDiarmid, but it is like No. 5350, mentioned above, in having a cross in MacNish's field, with evident obliteration marks over it. I think the learned Judge rightly allowed it, if it was not a spoiled ballot. I have no means of reviewing his conclusion that it was not a spoiled ballot, inasmuch as this appeal being a limited one, the Act does not authorize the transmission to me of anything but the ballot papers, which are the subject of appeal, together with a notice of appeal and a certificate of the learned Judge's findings.

The result is that I allow for Mr. MacDiarmid the following ballots, which had been rejected by the learned Judge:

Nos. 117, 3484, 3946, and 4858. I disallow No. 8468, which had been counted for him, whereby three votes are added to his poll.

I allow for MacNish Nos. 6145 and 1306, which the learned Judge had rejected, which adds two to his poll, and the conclusion of the whole matter is that MacDiarmid has a majority of one.

I think there should be no costs of the appeal.

G. A. B.

SOUTH PERTH (1898).

PROVINCIAL ELECTION.

BEFORE MR. JUSTICE MACLENNAN.

TORONTO, *March 26, 1898.*
April 12, 1898.

Ballot Papers—Marked with numbers—By Deputy Returning Officer—Marking cross on left-hand side—Name of candidate printed in wrong division—Uncertainty.

The fact that a number has been placed on the back of each ballot paper in a voting sub-division, in pencil, by the Deputy Returning Officer, will not invalidate them.

The fact that the cross is marked in the division on the left-hand side of the ballot paper containing the candidate's number, and not in the division containing his name, will not invalidate them. The *West Elgin Case*, ante p. 38, followed.

Where the printer had printed the surname of a candidate too high up and in the division of the ballot paper occupied by the name of another candidate:—

Held, that the ballots marked with a cross above the dividing line but opposite to the surname so placed could not be counted for such candidate, but were either marked for the other candidate, or were void for uncertainty.

THIS was an appeal from the County Judge of the County of Perth on a recount of ballots. The facts are stated in the judgment.

Wallace Nesbitt, and *F. H. Thompson*, for Monteith, one of the candidates.

Idington, Q.C., for Moscrip, another candidate.

No one for Frame, also a candidate.

MACLENNAN, J.A.:—

Appeal from a recount of votes before BARRON, Co. J.

There were 112 particular ballots objected to before the learned Judge, twenty-nine by Monteith and eighty-three by Moscrip. Objection was also made on behalf of Mr. Monteith to all the ballots cast at polling sub-division No. 3, Township of Downey, and sub-division No. 3, Township of Hibbert. The same ballots were all included in the appeal before me.

The objection to the ballots cast at No. 3 Downie, and No. 3 Hibbert, was that a number had been placed on the back of each ballot by the Deputy Returning Officer in pencil.

The learned Judge disallowed the objection, and I think he was clearly right in doing so, inasmuch as sec. 112 (3) of the Ontario Election Act R.S.O. 1897, ch. 9 expressly provides that "no word or mark written or made, or omitted to be written or made, by the deputy returning officer, on a ballot-paper, shall avoid the same."

The objection to a good many of the other ballots is that the cross is marked in the division at the left-hand side, containing the candidate's number, and not in the division containing his name. I have given reasons in the West Elgin case* for holding all such votes good, and I need not repeat them here. The learned Judge allowed that class of votes, and I affirm his decision.

I have examined each one of the whole one hundred and twelve ballots, which were questioned, and specially passed upon by the learned Judge, and I agree with his decision thereon in each case, and generally with his

*Ante p. 38.

reasons, with the exception of fourteen ballots allowed for Monteith, and with regard to which, with great respect, I have been unable to come to the same conclusion.

These are the following numbers: 739, 741, 1298 St. Marys; 2012, 2752 Blanchard; 4192 Downey; 7655, 8862, 8858 Logan; 6875, 7504, 7513 Mitchell; 5710 Hibbert; 5230 Fullerton.

I find myself obliged to come to the conclusion that all these ballots are either marked for the candidate Frame, or are void for uncertainty, and so cannot be counted for Monteith as they have been by the learned Judge.

The difficulty is occasioned by a fault in the printing of the ballot papers.

There were three candidates, Frame, Monteith and Moscrip; and their names were arranged in alphabetical order, Monteith being in the centre division. Frame chose black as his colour, Monteith blue, and Moscrip red; and it is said, and I suppose truly, that the ballot had to pass through the printing press at least three times, and in all these fourteen cases Monteith's surname, that is the one printed in large type, was placed either upon or above the line separating his division from Frame's, instead of being placed wholly within the division intended for it. The christian name and surname, however, in smaller type, and the addition of each candidate are wholly within his own division.

1	**FRAME** (George Frame, of the Township of Downie, in the County of Perth, Farmer.) **MONTEITH**
2	(Nelson Monteith, of the Gore of the Township of Downie, in the County of Perth, Farmer.)
3	**MOSCRIP** (William Caven Moscrip, of the Town of St. Marys, in the County of Perth, Barrister-at-law.)

In two of such cases, in which the cross was placed at the right hand of the large surname, but a little higher up than exactly opposite to it, the learned Judge allowed the votes for Frame; but in the above fourteen cases, where the cross was very nearly opposite to the large name Monteith, he allowed it, although in one case it was exactly on the dividing line, and in all the other cases wholly above it.

His reason for doing so is that the voter having placed his mark opposite to the candidate's name on the right hand side, has complied literally with the Act. And that would be so, but for the other direction that it may be placed anywhere within the division containing the candidate's name.

The difficulty is that the one of Monteith's names is in, or partly in, Frame's division, and that persons intending to vote for the latter are told they may do so by placing their cross anywhere within the division containing the name.

When the Legislature speaks of divisions containing the names, and when the form of ballot prescribed and used has lines upon it indicating such divisions, I think it cannot be said that the lines are immaterial, or that they

may be disregarded. I think a voter intending to vote for Frame, and being told that he would be right if he put his mark anywhere in the division containing his name, might have marked his ballot exactly as any one of these fourteen, which have been allowed for Monteith.

There is one exception from that remark, namely No 5230, in which the cross is exactly upon the line, and may have been intended for either one or the other.

The learned Judge says the dividing line between Mr. Frame's division and Monteith's division must be conceived to be drawn immediately above the surname of the latter; but I think I cannot disregard the fact that there is an actual dividing line upon the ballot, separating the two divisions, and that every one of the votes in question may in fact have been intended for Frame, being within the division of the ballot containing his name, notwithstanding that they are also at the right-hand side and opposite or nearly opposite to Monteith's name, and may have been intended for him.

I think those fourteen ballots ought not to have been allowed and ought to be taken off Mr. Monteith's poll.

The learned judge has not, in his certificate, stated what he found the majority to be; or in whose favour it was, and I can do no more than to decide that the fourteen ballots above mentioned ought to have been rejected.

I think there should be no costs.

G. A. B.

SOUTH PERTH (1898).

PROVINCIAL ELECTION.

BEFORE THE CHANCELLOR AND MR. JUSTICE MEREDITH.

STRATFORD, *October 14, and November 11, 12, and 14, 1898.*

CHARLES SCHOULTZ, *Petitioner,*

v.

WILLIAM CAVAN MOSCRIP, *Respondent.*

Ballot papers—Divisions of—Names of candidates in—Uncertainty as to—Ambiguity.

Where the surname of a candidate had been printed so high up in the ballot paper as to appear in the division containing the name of another candidate and to lead to uncertainty as to which of the two candidates' divisions of the ballot paper it was in it was held that the votes marked opposite to such surname were ambiguous and could not be counted for either candidate, and under the circumstances a new election was ordered.

The petition set out that the election was held on the 22nd day of February, 1898, and the 1st day of March, 1898, and contained the usual charges of corrupt practices as well as objections to the form of certain ballots whereon the name of "Monteith," a candidate, had been printed so high up as to appear in the division containing the name of Frame, another candidate, and to the counting of certain votes marked with a cross opposite the name Monteith.

Bristol, for the petitioner.

Aylesworth, Q.C., for the respondent.

BOYD, C.:—

In my opinion, as the case stands, the better view to take of these ballots is this, that they are ambiguous. If

I were obliged to decide upon the absolute value of each ballot for Monteith, I would have great difficulty. Some of them I might feel inclined to say were ballots for Monteith, having regard to the blue line at the side, but looking at the directions in the statute and in public notice, and giving due effect to the judgment of Mr. Justice Maclennan, I find that in nearly all of them there is a patent ambiguity in this, that the cross is literally opposite the name of Monteith, and is also in fact within the sub-division where Frame's name appears.

Now, the statute says that the ballot may be marked in either way. The directions to the voter tell him that he is to mark opposite the name of the candidate for whom he votes. Well, now, looking at these ballots, and having simply that direction to guide the voter, which is to be read as part of the Act, though it is in the schedule, looking at that you will find the cross is opposite Monteith's name in these ballots throughout. So that, looking at that alone, it is a Monteith vote.

You turn to the body of the Act, R.S.O. 1897, c. 9, and you see there is an alternative provided in sec. 103, which says: "Upon receiving from the deputy returning officer the ballot paper so prepared as aforesaid, the person receiving the same shall forthwith proceed into one of the compartments provided for the purpose, and shall then and therein mark his ballot paper in the manner mentioned in the directions contained in Form 12 in Schedule A to this Act"—incorporating that with the statutes — "by placing a cross thus X on the right-hand side, opposite the name of the candidate for whom he desires to vote, 'or at any other place within the division which contains the name of such candidate.'"

This sentence, I think, is to be read as meaning that the ballot is in the form prescribed by the Act, that there is an accurate sub-division, so that a mark opposite the name would be inside the division which is allotted to that

candidate, but where you have a ballot printed as this is you cannot give effect to the expression "other place," etc., because it is so printed that Monteith's name invades the area set apart for Frame.*

Now, you find this cross opposite Monteith's name, and also within the place allotted to Frame, so that the vote represents two things, the alternatives have been fulfilled by this vote.

That has been occasioned by the returning officer and the blunder of the printer, and if you go any further than that you can attribute it to the candidates themselves who chose to adopt different colours, which obliged the printer to run the ballot papers three times through the press, resulting in this misprinting and confusion by which one man has voted for two persons.

I think the ambiguity is such that there has not been a fair election. The Act has not been complied with, and as to sec. 214 there has been such mistake as has affected the result of the election, the majority standing only as three, one vote having been taken off yesterday.

MEREDITH, J.:—

It cannot, I think, be seriously contended that these fourteen voters did not *intend* to vote for Monteith; the only direction which each received was to "place a cross on the right-hand side, opposite the name of the candidate for whom he votes, thus X," and that direction every one of them has carefully observed, some of them putting the cross so near to the name of Monteith, opposite it and on the right-hand side, as to indicate more than ordinary care that there should be no danger of their intentions being frustrated.

Without doing violence to one's common sense, it cannot, I think, be admitted that there is any doubt of the intention of the voters to vote for Monteith, less that it was not their intention to vote for Frame.

* See form of the ballot at p. 50.—REP.

I do not understand that Mr. Justice Maclennan—(1898), 18 C.L.T. Occ. N. 255*—has come to any different conclusion as to the intentions of these voters; if he have, and be right, then I am incurably wrong.

Place the ballots and the "directions" which the voters had in the hands of any unprejudiced, reasonable man, and can it be thought that he would hesitate in pronouncing them to be marked by voters who intended to vote for Monteith? Take away the directions and the result would probably be the same.

Then, can we disqualify these voters; or, worse than disqualify them, give their votes to a candidate they intended to vote against, with the result of electing another candidate to whom they were opposed and against whom, also, they intended to vote?

If so, their candidate will be defeated, and a candidate they opposed elected by the slipping of their ballots in passing through an apparently ill-managed printing-press, instead of by a majority of the electors.

It is said that these votes must be counted for Frame, no matter what are the consequences, because, it is said, the cross though opposite and on the right-hand side of the name Monteith, is, through the misprinting I have referred to, within the division upon the ballot which contains the name of Frame.

I am not prepared to assent to either of these propositions.

There is nothing whatever in the "directions" to voters requiring or authorizing them to make the cross within any particular division; their only directions, as I have said, are to place the cross on the right-hand side opposite the name of the candidate they intend to vote for; and it seems to me to be of the utmost importance to bear this in mind when giving effect to that which they have done. It is the intention of the voter that is to be given effect to, and so far as that intention can be gathered

* Since reported ante p. 47.

from his act read in the light of the "directions" which the statute provides shall be published for his "guidance."

Nor does the Act itself require or direct that the cross shall be within any particular division; it rather takes it for granted that the ballots will be properly printed with the candidates' names in different divisions; and in enlargement, not in curtailment, of the validity of the vote, provides for the making of the cross not only on the right-hand side opposite the candidate's name, but also at any other place in the division which contains the name of the candidate.

There is no provision whatever directly requiring or authorizing the counting of all ballots for the candidate in whose "division" upon the ballot paper the cross may be; what is required is that "the Deputy Returning Officer shall then count up the votes given for each candidate upon the ballot papers not rejected:" sec. 112, sub-sec. 7. Ordinarily, as a matter of course, all votes marked in the candidate's division go to him; but in the extraordinary case of ballots without any dividing lines between candidates, I cannot think that votes opposite the name of a candidate are not to be counted for him; nor in this case, if put in its worst aspect for the candidate Monteith, is he to lose votes carefully marked for him in accordance with the "directions for the guidance of voters in voting," because his name may, by a printer's slovenliness, happen to be printed upon or above a line which was originally intended to be the dividing line between his space and another candidate's space on the ballot paper.

But if it be necessary to consider the question whether these marks are in Monteith's or Frame's division, I would agree with the learned County Court Judge that they may fairly be said to be in Monteith's division.

No doubt it was intended that there should be an equal or nearly equal division of the paper among the three candidates, and the thin, rather indistinct, horizontal line indicates that, but that intention was certainly not plainly,

and I would say not at all, carried out. The line is one which would probably be invisible to a large number of the electors; to those who, having passed middle life, need the aid of convex glasses, especially in a possibly ill-lighted voting compartment; and, apart from this line, the equal or unequal division of the whole paper could have no effect.

Against these two facts there is the much more important fact that the candidate's name, in bold type, indicates most strongly that at the least his space extends upward so as to include all the space upon which the name was printed, and to the right and left in a line with it, and the more so as it in no way over-lapped Frame's name, or name and address and description, and to the fact that the left-hand vertical line includes all this space. And why should it be altogether disregarded? These two facts seem to me together of much greater importance than the other two facts in determining what was Monteith's space.

That the candidate's space is not always confined to the lines within which the candidate's name, etc., appear, has been decided by Mr. Justice Maclennan in the West Elgin case—(1889), C.L.T. Occ. N. 249*—a judgment in which I entirely concur, but one which seems to me consistent only with the view I have expressed in this case.

I am, therefore, clearly of opinion that these votes were rightly counted for Monteith; but, put upon the lowest ground, they cannot be counted for Frame for the reasons given by the Chancellor. And as Mr. Bristol has offered to have the election avoided and to have a new election, it seems to me better to concur in that course, which will no doubt be more satisfactory to the electors at large than a continuation of this costly litigation and the "counting in" one of these gentlemen on questions about which there is already some degree of judicial disagreement.

G. A. B.

*Since reported ante p. 38.—REP.

WEST HURON.

PROVINCIAL ELECTION.

BEFORE OSLER, J.A.

March 23, 1898.
March 26, 1898.

JAMES T. GARROW, *Petitioner,*

v.

JOSEPH BECK, *Respondent.*

Ballots—Marking—Validity of.

A ballot properly marked but not initialed by the deputy returning officer, having instead the initials C. S. which appeared, and were assumed, to be those of the poll clerk, was held good.

A ballot from which the official number was torn off, without anything to shew how it happened, was held bad.

Ballots marked — / or V or Λ were held good.

Jenkins v. *Brecken* (1883), 7 S.C.R. 247, followed.

Ballots marked for a candidate, but having (1) the word "vote" written after his name; (2) having the word "Jos," being an abbreviation of the candidate's christian name, written before his name; (3) having the candidate's surname written on the back of the ballot, were held bad.

Aylesworth, Q.C., for the petitioner.

Wallace Nesbitt, *W. D. Macpherson*, and *C. A. Masten*, for the respondent.

The facts appear in the judgment.

THIS was an appeal and cross-appeal under R.S.O. 1897, ch. 9, secs. 129-131, from the recount of the ballots by the county judge.

OSLER, J.A.:—

The following ballots formed the subject of Mr. Garrow's appeal:—

No. 1: Ballot 3,782. Poll No. 3, West Wawanosh.

This ballot was counted by the deputy returning officer, but was rejected by the county judge. It is claimed for Mr. Garrow.

The ballot is properly marked by the voter for the claimant. It is not initialled by the deputy returning officer who was appointed by the returning officer for that polling place.

The statement No. 12, Form 22 of the Act, being the ballot paper account, shews that ninety ballots were used, and that is the number counted by the deputy returning officer. The poll book shews the same number of names marked therein as having received ballots. The learned county judge reports that he had found only eighty-nine names so marked, but both parties conceded that this was an error, which probably arose from the name in the schedule of persons voting under certificate Form F having been overlooked.

Of these ninety ballots, eighty-nine are indorsed with the initials of the deputy returning officer who had been appointed for that poll, and one, being that in question, is not so indorsed, but is indorsed with the initials C.S.

The learned county judge, finding that the whole number of ballots counted was not the same as the number given out, rejected the ballot in question "as one not having the initials of the deputy returning officer indorsed thereon, and as having marks thereon"—to wit, the initials C.S.—"by which the voter could be identified, and there being room to doubt its genuineness."

The last reason assigned refers to the fact, as the learned judge supposed it to be, that the tally was complete without this ballot.

In the case of this particular ballot, therefore, the whole number of ballots counted agreeing with the number of names marked in the poll book as having received ballots, the absence of the initials of the deputy

returning officer would not be a ground for its rejection, and it ought to be counted, unless the presence thereon of the initials C.S. invalidate it as being something written or marked thereon by which the voter can be identified.

In a proceeding of this kind, the official to whom is committed the duty of counting or recounting the ballots, cannot take evidence for the purpose of ascertaining whether a particular ballot is good or bad; but, whether deputy returning officer, county judge, judge sitting in appeal from the latter, I think he is at liberty to draw any inferences which are fairly capable of being drawn from the election papers before him. The county judge and the appellate judge must be in the same situation in this respect as the deputy returning officer.

Now, I see by the election papers that one Charles Stuart was the duly appointed poll clerk at this poll, and comparing the initials referred to with the numerous signatures which, as poll clerk, he has affixed to the several declarations and affidavits signed by him, which form part of the election papers before me, I feel no difficulty in finding as a fact, that these initials are the initials of the said poll clerk written by him on the ballot paper. If they are, ought the ballot to be rejected under sec. 112, sub-sec. 3? I think not.

Sec. 88 of the Act enacts that the "poll clerk shall, at the polling place for which he is appointed, aid and assist the deputy returning officer in the performance of the duties of his office;" and sec. 89 provides that "if the deputy returning officer refuses or neglects to perform the duties of his office, or becomes unable to perform them, either by death, illness, absence, or otherwise, and if no other deputy returning officer duly appointed by the returning officer in the place of the former, appears at the polling place, then the poll clerk shall act at the poll as deputy returning officer and perform all the duties and be subject to all the obligations of that office, in the same

manner as if he had been appointed deputy returning officer by the returning officer."

The language of this section is very wide, and covers an absence of the deputy returning officer of the most temporary kind. The poll must be kept open from nine o'clock until five o'clock, and the deputy returning officer ought to be in his place during the whole of that time to take the votes. Yet some controlling necessity may prevent him from being there for some part of the day, be it for five minutes, a half an hour, or even longer, and then the poll clerk takes his place as a matter of course under the powers conferred upon him by sec. 89. It is observable that he is not obliged, as the deputy returning officer is, to appoint a poll clerk. The language of the Act in his case is that he *may* do so. He naturally would do so were the deputy returning officer to be absent for the whole or a great part of the day, but would hardly think it necessary if the absence was to be so short that no more than a few votes might be expected to be taken.

My conclusion is that the ballot bears the initials of the polling clerk, acting as deputy returning officer *ad hoc;* that it is a good ballot, and ought not to have been rejected, and must be counted for the candidate Garrow.

I rather infer, from what the learned County Judge has said, that he would also have counted it but for the supposed error in the count of votes, already referred to.

No. 2: A ballot without any official number. Poll No. 5, Ashfield.

This ballot has been counted by the deputy returning officer and by the county judge for Mr. Beck.

It is objected to on the ground that the official number has been torn off. It bears the initials of the deputy returning officer, and is properly marked for Mr. Beck. A narrow strip has been torn off along the upper part from one end to the other at right angles to the division between the ballot and the counterfoil. The official

number is thus, it may be said, entirely torn off, though there remain some slight marks which shew that before the paper was mutilated there was a number upon it. I am clear that this ballot ought to have been rejected.

I cannot assume that the deputy returning officer gave it to the voter in its mutilated condition. Neither can I assume that somebody may have mutilated it after it left the voter's hands and was placed in the ballot box.

As the matter stands before me, whatever other aspect it might wear if extrinsic evidence on the subject could be given to shew that it was torn after it had been counted by the deputy returning officer, the only presumption to be made by the county judge, or by me, is that it was mutilated by the voter. An integral part of the ballot having thus been removed, I am of opinion that the remainder has ceased to be a ballot, and that it should not have been counted. Very different considerations would apply if merely a blank part of the ballot paper had been torn off.

The appeals of the candidate Garrow in respect of five other ballots were heard and dismissed on the argument.

As to them, I affirmed the decision of the county judge, following, as regards ballots marked with a single horizontal or slanting line —— / or with a cross in this form X or this ∧, the judgment of the Supreme Court in *Jenkins* v. *Brecken* (1883), 7 S.C.R. 247.

Then, as to the appeal of the other candidate, Mr. Beck.

No. 1: Polling sub-division No. 1 of Colborne. A ballot marked for Mr. Beck, and with the word *vote* written after the candidate's name.

No. 2: Polling sub-division No. 2, Goderich. A ballot marked for Mr. Beck, and with the word *Jos.* written before the candidate's name.

No. 3: Polling sub-division No. , Ashfield. A ballot also marked for Mr. Beck, and with the words *for Beck* written on the back.

These ballots were disallowed by the deputy returning officer and by the county judge.

Upon the best consideration I have been able to give to the authorities cited, and which, sitting here, I am bound to follow, I am entirely of opinion that these ballots were all properly disallowed. There is nothing to shew that the writing was not placed on the back or front of the ballot by the voter himself. The presumption is that it is his writing.

The whole subject of ballot marking is well worthy of examination by the full Court of Appeal with the view of laying down more clear principles of construction of the relevant sections. The course of decision in this country has, however, been to disallow ballots marked as above. I refer to the *North Victoria Case* (1875), H.E.C., 671, at p. 681, where it is said: "The voter besides putting the cross for the respondent has written the respondent's name in full. That is certainly bad, for by that writing the voter may be identified. I cannot say it may not have been put there for just such a purpose."

And the same principle was applied in *Woodward* v *Sarsons* (1875), L.R. 10 C.P. 733. "The ballot must not be so marked . . as to make it possible by seeing the paper itself, or by reference to other available facts, to identify the way in which the voter has voted. The handwriting of the voter would, in many instances, even if found in a single word, or part of a word, furnish a very potent means of identifying him."

The count of these votes must be affirmed. It seems unnecessary to refer in detail to others which were discussed on the appeal, and which were held to have been rightly allowed or disallowed.

I shall direct the county judge in accordance with the above decision as to the ballots in polling sub-divisions No. 3. West Wawanosh, and No. 5, Ashfield.

I do not think that any of the appeals can justly be described as frivolous, and, unless that were the case, in a proceeding of this kind, permitted by law in order to ascertain and determine, as far as possible the result of the election, it would be very hard measure to visit the unsuccessful party in the appeals with the costs. As to costs therefore I make no order.

G. F. H.

OTTAWA.

PROVINCIAL ELECTION.

BEFORE OSLER, J.A., IN CHAMBERS.

TORONTO, *May 10th, 1898.*

JACOB RANDALL, *Petitioner,*

v.

CHARLES BERKELEY POWELL, *Respondent.*

Return of Members—When Made—R.S.O. ch. 11, sec. 9—Presentation of Petition—Notice of Endorsement on Petition—Necessity for Separate Notice.

The return of a member by the returning officer is only made when it has been actually received by the clerk of the crown in chancery, and not when the returning officer has placed it in the express or post-office for transmission to such clerk.

It is not essential that under the Ontario Act, R.S.O. ch. 11, sec. 15, that a notice of the presentation of a petition should be served, where such notice is indorsed on the petition.

THIS was a motion to set aside the petition filed herein on the ground that it was filed too late for the reasons set out in the judgment.

Wallace Nesbitt, for the respondent, for the motion.

Watson, Q.C., for the petitioner, contra.

OSLER, J.A.—

Two objections were made to the proceedings:

1. That the petition was presented too late because not presented, as it is said, within 21 days "after the return has been made to the clerk of the Crown in Chancery of the member to whose election the petition relates," as required by sec. 9 of the Controverted Election Act, none of the conditions arising which permit of a presentation at a later date.

2. That no notice of the presentation of the petition was served with the copy of the petition as required by sec. 15 of the Act, R.S.O. (1897) ch. 11.

In support of the first objection it was contended that the return to the clerk of the Crown in Chancery is made within the meaning of sec. 9 when the returning officer has actually placed it in the express office or in the post office for the purpose of transmitting it to the clerk: R.S.O. 1897, ch. 9, sec. 135.

The inconvenience of such a construction is manifest, as no one has any means of ascertaining when a return has been thus made except by enquiry from the returning officer, who is not by law bound to give him, or indeed, anyone else, any information on that subject. The time, moreover, in which he is bound to "make and transmit" his returns varies according to the circumstances mentioned in sec. 134 R.S.O. ch. 9. Sec. 139 R.S.O. ch. 9 obliges the clerk of the Crown in Chancery on receiving "the return" to give in the next ordinary issue of the Ontario *Gazette*, "notice of the receipt of the return, *the date of such receipt*, and the name of the candidate elected." There is no provision whatever which enables any one with assurance of certainty to ascertain the day on which the return left the hands of the returning officer. The object of sec. 139 was to secure the publication of information of which everybody would be obliged to

take notice; and I think it was for the very purpose, *inter alia*, of fixing the date from which proceedings to attack the election should run.

In my opinion, therefore, bound as we are to read these two acts *in pari materiâ*, the return is made to the clerk of the Crown within the meaning of or for the purpose of sec. 9 of the Controverted Election Act, R.S.O. ch. 11, when it has been received by him and not earlier.*

The second objection is more troublesome, and certainly is provoked by the omission of the petitioner to comply with a plain direction of the Act; but on the whole, after some consideration, I am of opinion that I ought not to yield to it.

Sec. 9 R.S.O. ch. 11 enacts that the petition is to be presented within 21 days, and sec. 10 that presentation shall be made by delivering it to the Registrar of the Court or otherwise dealing with the same in the manner prescribed. No manner is prescribed for otherwise dealing with it, and a petition is thus presented within the meaning of the Act by simply filing it with the proper officer with the affidavit required by sec. 11. And sec. 18 so speaks of it: "Where a petition has been filed, etc." Then sec. 15 under the heading "Service," enacts that "Notice of the presentation of a petition under this Act accompanied by a copy of the petition, shall, within five days after the day on which security for costs has been given, . . . be served by the petitioner on the respondent . . . in the manner in which a writ of summons is served," etc.

No separate notice of presentation was served, but a copy of the petition itself was duly served, on which was endorsed the following: "This petition is filed, etc.

The question is whether this omission of the separate notice of "presentation" of the petition is fatal to the proceedings.

[* See *Mackinnon* v. *Clark* (1898), 14 Times L.R. 485; [1898], 2 Q.B. 251.—Rep.]

Under the Controverted Election Act of 1871 34 Vic. ch. 3 (O.), the first statute on the subject in this Province, sec. 8 provided that notice of the presentation of a petition under this Act and the nature of the proposed security accompanied by a copy of the petition should be served within five days after the security was given.

Under that Act security was to be to the amount of $800, and might be given by recognizance by any number of sureties not exceeding four, or by a deposit of money in the manner prescribed, or partly in one way and partly in the other; and it was therefore extremely important that the respondent should have exact notice of the nature of the security, in order that he might at once within the limited time object thereto if given by, or partly by, recognizance.

There is a similar provision in the English Controverted Election Act, 1868, and in the Municipal Election Act, 1872. Under the latter the case of *Williams* v. *Mayor of Tenby* (1875), 5 C.P.D. 135, was decided. It was held that the omission to serve notice of presentation of the petition and of the nature of the proposed security was a condition precedent to the maintenance of the petition and was a thing imperatively required to be done.

In giving judgment, Grove, J., remarks at p. 137: "It is said that there would be hardship supposing money deposited, if mere omission of notices should prevent a petition. I see no more hardship than may occur in any case where a definite time is to be observed, and I see good reason why it should be so. There are two alternatives given, and it is reasonable that the party should know which has been adopted, viz., deposit or recognizance, and, if the latter, that he should be set instantly on enquiry whether the securities are good and valid or not. . . . Not only is the person depositing the security limited by the rules as to time but the person objecting to the security is limited likewise."

Had our Controverted Election Act remained in the same terms in this respect as when it was first enacted, this

decision would support the respondent's objection. It was, however, amended by the 39 Vict., c. 10, sec. 29 (O.), and security was thenceforward required to be given solely by the deposit of the sum of $1 000, and in the revision of the statute in 1877 the commissioners, taking notice of this, omitted that part of the section corresponding to sec. 8, above cited, which required notice of "the nature of the proposed security" to be given, though they left that part of it which required service of notice of the presentation of the petition, and so the statute law now stands.

The Dominion Act, R.S.C. ch. 9, sec. 10, still requires notice to be given of the presentation of the petition "and of the security" within five days after the petition has been presented, although the security is also by deposit of money only, which is to be made at the time of presentation of the petition.

So far as the Ontario Act is concerned no form of notice of presentation is prescribed. It does not seem necessary that it should specify either when the petition was filed or when the security was given. The language of the section would be satisfied by mere notice that a petition had been presented in respect of such or such return under the Act. Had it been required to be signed by the petitioner it might have been thought that the notice was intended to serve the purpose of verification and to identify the copy of the petition to be served with that which the petitioner had sworn to, but this is not prescribed. It is difficult to see what purpose is served by a notice of presentation which would be sufficient within the Act which is not equally well served by the endorsement which appears on the copy of the petition served on the respondent. The reasons which seemed unanswerable in the Tenby case, have here no place, looking at our different legislation.

I think, therefore, that the motion must be dismissed, but it is not a case for giving costs to the respondent.

G. F. H.

Re Voters' List of the Township of Seymour.

ONTARIO VOTERS' LISTS ACT.

Before the Court of Appeal.

Present—Burton, C.J.O., Osler, Maclennan, Moss, and Lister, JJ.A.

January 10, 1899.
January 24, 1899.

(Special Case.)

Voters' List—"Resided continuously"—Meaning of.

The provision of sec. 8 of the Ontario Voters' List Act, R.S.O. 1897, ch. 7, that persons to be qualified to vote at an election for the Legislative Assembly, must have resided continuously in the electoral district for the period specified, does not mean a residence *de die in diem*, but that there should be no break in the residence; that they should not have acquired a new residence; and where the absence is merely temporary, the qualification is not affected.

Where, therefore, persons resident within an electoral district, and otherwise qualified, went to another Province merely to take part in harvesting work there, and with the intention of returning, which they did, their absence was held to have been of a temporary character, and their qualification not thereby affected.

In the matter of the revision of the Voters' List of the Township of Seymour, in the County of Northumberland, in the year 1898.

This was a case stated by the Junior Judge of the County Court of the United Counties of Northumberland and Durham, for the opinion of the Court of Appeal, or of a Judge thereof, pursuant to section 38 of the Ontario Voters' List Act, R.S.O. 1897 ch. 7.

Upon the revision of the Voters' List of the said Township of Seymour, at a Court duly held for that purpose on the 1st day of December, 1898, the four applications hereinafter mentioned were heard, and judgment thereon was reserved until an opinion should be given on the case submitted.

The question, in each case, arose upon that part of section 8 of the Ontario Election Act, which requires that

a person, to be qualified to vote at elections to serve in the Legislative Assembly, shall be, at the time of tendering his vote, a resident of, and domiciled within, the electoral district, and "had resided in the said electoral district continuously from the time fixed as aforesaid for beginning to make said roll, or for making such complaint, as the case may be."

The time for beginning to make the assessment roll of the township was on the 15th day of February, and, in the year 1898, the last day for making complaint to the Judge, of errors in the Voters' List, was the 19th day of October.

None of the persons, with regard to whom this case was submitted, were of the privileged classes mentioned in section 11 of the Election Act. Each of the said persons had resided within the Province of Ontario for the nine months next preceding the 15th day of February, 1898.

Each of the said persons was duly qualified, and entitled to have his name entered on the Voters' List of the township for the year 1898, as being entitled to vote at elections to the Legislative Assembly, unless he was disqualified by reason of his absence from the electoral district during the period, and under the circumstances hereinafter mentioned.

Each of the said persons was absent from the electoral district and in Manitoba, on the 19th October, and for, at least, a month thereafter, and the circumstances under which they were so absent, were as described in the case of Robert Little, all the cases being similar in character, except as hereinafter particularly noted.

1. Application was made to add to the list the name of Robert Little. The said Little was a young unmarried man, whose parents resided in Seymour, and he resided there with them, and was so residing there on the day on which his application was heard. On the 18th day of August, 1898, he left Seymour for Manitoba, on one of the excursions organized by the railway company, and known

as a "Farm Labourers' Excursion," the object of which was to induce farm labourers in Ontario to go to Manitoba to assist in gathering in the harvest there. He intended to return to Seymour after the harvesting operations in Manitoba were over, and procured a railway ticket for his passage to Manitoba at a reduced rate, on the condition (amongst others) that he should work as a farm labourer while in Manitoba, for at least thirty days, and he was entitled to a return ticket at a like reduction rate, on producing to the railway agent a certificate from his employer in Manitoba, on a form provided by the railway company, that he had so worked there for that period of time. He worked, while in Manitoba, by the month, *i.e.*, he engaged for a month certain and from month to month, at a stipulated monthly wage, and was so engaged there on the 19th October, and until about the 19th November, when he left Manitoba, and returned at once to Seymour.

2. Application was made to strike out of the list the name of Arthur Ivey.

His case was similar to that of Robert Little, except in the fact that while in Manitoba he worked by the day, *i.e.*, he engaged from day to day, at a stipulated daily wage, instead of by the month.

3. Application was made to strike out of the list the name of Norman Fraser. His case was similar to that of Robert Little, except in the fact that his parents do not live in the electoral district, and he had no *established home* there; he was a labourer, who made his home with his employers while in the electoral district.

4. Application was made to strike out of the list the name of John Morrison. His case was similar to that of Robert Little, except in the fact that he was a married man, whose wife continued to reside in the electoral district during his absence in Manitoba.

The question in each case was, whether the voter can be said to have been resident in the electoral district continuously from the 19th October.

N. Ferrar Davidson, for the four voters.
Allan M. Dymond, for the Attorney-General.

OSLER, J.A.—The question submitted by this special case is one which I have frequently had to consider in election trials when dealing with charges under section 168 of the Election Act, which provides that every person who votes at an election knowing that he has no right to vote shall be guilty of a corrupt practice.

The effort has been to support such charges by proof that the voter must have known that he had no right to vote because he had not, as required by the latter part of sec. 8 of the Act, resided in the electoral district continuously from the time fixed for beginning to make the assessment roll or for making complaint to the County Judge as the case might be; and the argument was that continuously meant *de die in diem*, and that the voter must have known or must be taken to have known this.

I have always disposed of such charges on the ground that the section 168 required the existence of the *mens rea* on the part of the voter to be shewn, and that he could not be held guilty of a corrupt practice and liable to the penalty imposed by the section where he honestly believed that he had a right to vote, but that right depended upon the view that might be taken of the true construction and meaning of section 8. Having in mind the various meanings of the terms "residence" and "resided," it is, in my opinion, impossible to hold that the legislature intended by the word "continuously" in this section to infer a residence *de die in diem* within the electoral district. The voters' residence being within the district, what is meant is that there shall be no break in the residence; that the voter shall not, during the time specified, have acquired a new residence. His business may require him to go from his home for a day or a week, or even longer, and such temporary absence, *animo revertendi*, is not a

break in his residence in the electoral district. I do not intend to offer a general definition of the term "residence," but I think we may well apply the language of Lord Campbell in *Regina* v. *Stapleton* (1853), 1 E. & B. 766, at p. 772, "when a man is absent for a temporary purpose, with an intention to return when that temporary purpose is served, as, for instance, when he is absent for a week's work in another parish, meaning to come back at the end of the week, it is no break in his residence. The phrase 'temporary purpose' is not very definite; still I think it may in each case be known whether the purpose was temporary or not."

To the same purpose is the case of *Regina* v. *Brighthelmstone* (1854), 4 E. & B. 236, also cited by Mr. Davidson.

In the case before us the absence from home was much longer, but the principle of the authorities cited fully applies. The voter went to Manitoba for a purely temporary purpose, namely, to engage in harvesting operations there during the summer, intending to return to his home in Seymour when they were at an end.

I think all the persons mentioned in the case were entitled to be placed on the Voters' List. Norman Fraser was already on it, and as to him, perhaps, the most that can be said is that not enough was shewn to displace him.

As to costs, I do not see that there is any one against whom in such a case as this we can make an order to pay them.

MACLENNAN, J.A.—The question submitted arose upon the revision of the Voters' List for the Township of Seymour, on the 1st December, 1898.

Applications were made to add to the list the name of Robert Little, and to remove therefrom the names of Arthur Ivey, Norman Fraser and John Morrison, on the ground of insufficient residence in the electoral district.

Little's residence was sufficient in every respect within the meaning of section 8 of the Election Act, unless he was disqualified by absence in Manitoba, whither he went on the 18th of August, and where he remained until the 19th of November, 1898, when he returned. The last day for making complaint of his omission from the list was the 19th of October, and his complaint was heard on the 1st day of December. The time during which he was absent was time during which the Act required him to have been resident and domiciled continuously within the electoral district. He is a young unmarried man, and before and after his absence in Manitoba he resided with his parents in the Township of Seymour. He went to Manitoba for temporary employment in harvesting, intending to return when harvesting was over, and did so; and the question is whether his absence was such an interruption of continuous residence within the electoral district as to deprive him of the franchise.

I am clearly of opinion that it was not. His stake and interest in the country, and its government, were not affected by his absence, and the legislature has shewn its anxiety that young men otherwise qualified to exercise the franchise should not be disqualified by such absence, by enacting section 11, in favour of a long list of persons, whose employment and occupation require them to be absent from home occasionally, or temporarily. I think that section was enacted, not because such absences would otherwise be fatal, but to make the matter clear and to prevent disputes at the poll.

I think the cases to which we were referred by Mr. Davidson, namely, *Regina* v. *Stapleton* (1853), 1 E. & B. 766, and *Regina* v. *Brighthelmstone* (1854), 4 E. & B. 236, are authority for holding that the continuous residence, required by the statute, was not interrupted by Robert Little's absence in Manitoba. That temporary absence, even of very considerable duration, is not inconsistent with

continuous residence, where the franchise is concerned, is further shewn by a paragraph of the oath, required to be taken by a farmer's son, R.S.O. ch. 223, sec. 86 (4c) and sec. 115, which is as follows: "That you resided on the said property for twelve months, next before the said day, not having been absent during that period, except temporarily, and not more than six months in all." That is the oath which was prescribed for farmers' sons, for the purpose of elections to the Legislative Assembly in 1877, by 40 Vict. ch. 9, secs. 3 and 8, long before the Act providing expressly for the temporary absence of lumbermen, mariners, etc., now contained in sec. 11 of the Election Act, and which was first enacted by 51 Vict. ch. 4, sec. 4, in 1888.

I also think the other three names ought to be left on the list. We must assume that they were rightly placed on the list in the first instance, and the only question is whether a similar absence by them requires their names to be removed. I think it makes no difference whether their employment in Manitoba was by the day, or by the month. One of them, Norman Fraser, was a little differently situated from the others. His parents did not reside in the electoral district. He is a labourer, and made his home with his employers in the district, and the learned Judge states that he had no *established* home there, by which I think is meant, that his home changed from time to time with his employers, but that both before and after his absence, it was within this district, and his absence was temporary, and with the intention to return.

BURTON, C.J.O., MOSS, and LISTER, JJ.A., concurred.

G. F. H.

NORTH WATERLOO.

PROVINCIAL ELECTION.

BEFORE BURTON, C.J.O., OSLER, MACLENNAN, MOSS, AND LISTER, JJ.A.

BERLIN, *September 22nd, 1898.*
TORONTO, *October 14th, 1898.*
" *January 24th and 25th, 1899.*
" *March 14th, 1899.*

JACOB SHOEMAKER, *Petitioner,*

v.

HENRY GEORGE LACKNER, *Respondent.*

Particulars—Verification of—Appeal—Vagueness of Particulars—Judgment within 15 days of Session—Treating a Meeting—Distinction between Bribery and Treating—Saving Clause—R.S.O. ch. 9, secs. 159, 161, 172—Ib. ch. 11, sec. 48.

In proceedings under the Controverted Elections Act, R.S.O. ch. 11, it is sufficient to attach an affidavit of verification to the particulars filed, without serving an affidavit of verification on the respondent.

It is too late on appeal from the judgment on an election petition to object to the insufficiency or vagueness of the particulars.

Notwithstanding R.S.O. ch. 11, sec. 48, providing against trial of a petition during a session or within 15 days from the close thereof, when judgment has been reserved after examination of witnesses and hearing and the arguments of counsel, the trial Court may give it and issue their certificate and report at any time whether during or after a session.

Where after a meeting of electors had broken up, an alleged agent of the respondent had treated at the bar of the hotel, where it had been held, a mixed multitude comprised of some who had been at it, and others who had not :—

Held (MACLENNAN, J.A., dissenting), that this was not treating "a meeting of electors assembled for the purpose of promoting the election," within sec. 161 of the Ontario Election Act, R.S.O. ch. 9.

Per MACLENNAN, J.A., seeing that several persons assembled at the bar waiting for the meeting were treated before the meeting by the hotel-keeper, whom the respondent's agent had asked to treat "the boys" before himself leaving to attend a meeting elsewhere, and whom the agent afterwards paid, and that several who were treated after the meeting had been at the meeting, and then in company with the

respondent went very much in a body to another hotel, where they were treated again. Held that this was a treating of the meeting within the last mentioned section.

Held, also, by the Court of Appeal, reversing the decision of the trial Judges, that such treating was not "bribery" within R.S.O. ch. 9, sec. 159.

Corrupt treating in its nature runs very close to bribery on the part of the treater, but the circumstances in which a treat can be said to be a valuable consideration within sec. 159 so as to amount to bribery on the part of the person accepting it, must be unusual.

Where only two acts of bribery were proved, but the perpetrators were both active, and one an important agent of the candidate, neither of whom was called at the trial, and one of the bribes, though only $2, was paid out of a general election fund, to which the respondent had contributed $250, and the respondent's majority was 65 out of a total vote of about 5000 :—

Held, that the election was rightly avoided, notwithstanding the saving clause in sec. 172 R.S.O. ch. 9.

THIS was an appeal, upon the grounds and under the circumstances stated in the judgment of OSLER, J.A., from the judgment of the trial Judges in respect to a petition against the return of Henry George Lackner as a member of the Legislative Assembly of the Province at an election for the electoral district of North Waterloo holden on February 22nd and March 1st, 1898.

The trial took place at Berlin before ROSE and MACMAHON, JJ.

The respondent was unseated.

Aylesworth, Q.C., and *W. D. Macpherson*, for the (respondent) appellant, referred to *Hamilton Case* (1891), 1 E.C. at p. 502; *Borough of Westbury Case* (1869), 1 O'M. & H. at p. 50; *North Ontario Case* (1884), 1 E.C. at pp. 1, 20, 21, 30, 31; *Glengarry Case* (1871), H.E.C. 8; *East Toronto Case* (1871), ib. pp. 70, 90; *North Middlesex Case* (1875), ib. pp. 376, 383-6; *Kingston Case*, ib. pp. 625, 635-6; *South Norfolk Case*, ib. pp. 660, 669-70; *East Elgin Case* (1879), ib. at pp. 771-7; *West Simcoe Case* (1883), 1 E.C. at pp. 149-50; *East Middlesex Case* (1883), ib. at pp. 274-5; *East Simcoe Case* (1883), ib. at pp. 303, 308, 346; *Welland*

Case (1884), ib. p. 383; *West Hastings* Case (1879), H. E.C. p. 539; *Carrickfergus Case* (1880), 3 O'M. & H. 90; *North Middlesex Case* (1875), H.E.C. at p. 381; *North Ontario Case* (1884), 1 E.C. at p. 19; *Kingston Case* (1874), H.E.C. at p. 635; *State* v. *Strauss* (1878), 49 Md. at p. 299; Chitty on the Prerogatives of the Crown, at p. 71; Stroud's Judicial Dict., *sub voce* "Trial."

E. F. B. Johnston, Q.C., *R. A. Grant*, and *J. C. Haight*, for the (petitioner) respondent, referred to *West Wellington Case*, 1 E.C. 231; Rogers on Elections, 17th ed., vol. 2, pp. 299-301; *Berthier Election Case* (1884), 9 S.C.R. 102; *Youghal Case* (1869), 1 O'M. & H. 291; *The Prescott Case* (1884), 1 E.C. 88, 92; *West Simcoe Case* (1883), ib. pp. 128, 149-50, 156, 178; *North Ontario Case* (1884), ib. pp. 1, 18; *East Simcoe Case* (1884), ib. pp. 334, 341; *North Middlesex Case* (1876) H.E.C. at p. 386; *West Hastings Case* (1879) ib. at p. 540; *Taunton Case* (1874), 2 O'M. & H. at p. 74.

OSLER, J.A.:—

This is an appeal by the respondent in the election petition from the judgment of the trial Judges by which his election and return as member for the electoral district of North Waterloo were avoided and set aside.

The trial took place and all the evidence was given before the said Judges at the town of Berlin on Thursday, September 22nd, 1898. Two charges of bribery were then held to have been proved, and judgment was reserved in respect of two other charges of corrupt practices, which, by consent of all parties, was to be delivered at the city of Toronto, a place not within the electoral district, on October 14th, 1898. At that time and place judgment was accordingly delivered, finding that such other charges were also proved, and determining that the election and return were void and could not be supported under the saving provisions of sec. 172 of the Election Act, R.S.O. ch. 9.

The respondent having lodged this appeal from the decision of the trial Judges, the certificate and report of their decision was made to the Court of Appeal as required by sec. 8 of the Election Act of 1898, 62 Vict. ch. 4. It bears date October 22nd, 1898.

The grounds of appeal substantially are:—1. That no proper or sufficient particulars of the corrupt practices intended to be relied upon, verified by affidavit, as prescribed by the statute and rules in that behalf, were furnished to the respondent.

2. That a portion of the trial, that is to say, the delivery of the judgment upon the reserved charges and the avoidance of the election, took place without the consent of the respondent at a time when it was not lawful for such trial to be proceeded with without such consent, that is to say, within fifteen days after the close of a session of the Legislative Assembly.

3. That the facts proved in regard to the charges upon which judgment was reserved did not constitute the corrupt practice found nor any corrupt practice within the Election Act; and

4. As regards the two charges of bribery which had been found proved on the first day of the trial, they had been committed without the knowledge and consent of the respondent, and were so trifling in their nature and extent that the election ought not to have been or to be avoided therefor.

The petitioner lodged a cross-appeal, contending that the facts proved in relation to the charges on which judgment had been reserved, constituted not merely the offence of bribery as found by the trial Judges, but also an offence within sec. 161 of the Election Act, R.S.O. ch. 9, and that the election ought to be held avoided on the other two charges of bribery alone.

We cannot give effect to the first ground of appeal. Particulars were filed, with an affidavit of verification, and

were also served, but no affidavit was served. The party is not required by Rule or statute to make two affidavits. If the affidavit of verification is attached to the particulars filed that is sufficient. They are complained of as being too vague, and general. They are, no doubt, very awkwardly framed, each of the clauses objected to comprising a great many charges of a similar kind. It was, however, for the Judges at the trial to decide whether the respondent was embarrassed by the form in which they were presented. He does not seem to have been so, and there is no reason why we should now, even if we could, interfere on this ground. Had time served before the trial, a Judge in Chambers might, no doubt, have done so had he thought respondent embarrassed by the form of the particulars, but it is now too late to entertain the objection, nor, as things have turned out, is there any substance in it.

The second objection, though a technical one, in the sense that it has nothing to do with the real merits of the case, but is concerned simply with the mode in which it was disposed of, is a more important one.

A session of the Legislative Assembly commenced on the third day of August, 1898, and on the 24th day of the same month was adjourned to meet again at such time as it should be called for that purpose by proclamation of the Lieutenant-Governor, and on September 22nd, 1898, when the trial was commenced and all the evidence in the cause was taken, the session was still in existence, though adjourned as above mentioned. The 47th section of the Controverted Election Act, R.S.O. ch. 11, provides that, "subject to the provisions of sec. 48, the trial of every election petition shall be commenced within six months from the time when the petition was presented, and, so far as is practicable, consistently with the interests of justice in respect of such trial, shall be continued *de die in diem* on every lawful day until its conclusion. . .".

"Sec. 48: In case the member elect is entitled to take his seat, the trial of the petition shall not, without his

consent, be held during a session of the Legislative Assembly or within fifteen days after the close of a session; and in the computation of any *delay allowed* for any step or proceeding in respect of the trial or *for the commencement* of the trial under the next preceding section, the time occupied by the session shall not be reckoned."

If, therefore, there had been no other legislation upon the subject than the two sections I have quoted, the trial of the petition could not have lawfully commenced when it did, inasmuch as the session was still in existence, and the member elect being entitled to take his seat, and having in fact done so, had not consented to the trial being so held.

But by sec. 3 of the Election Act of 1898, 62 Vict. ch. 4, passed during the session in question, sec. 48 was amended by adding thereto the following proviso: "Provided that if a session of the Legislature shall have commenced and shall have been adjourned (which was the case here) then the trial may be proceeded with during the period of adjournment, after the expiration of fifteen days from the day of adjournment, . . . and for the purposes of this section the period of adjournment shall not be reckoned as part of a session."

Then it was declared that the section (*i.e.*, sec. 3—in effect the proviso), should remain in force only until the end of the present session and should apply to pending petitions. This clause was passed, as every one knows, for the express purpose of enabling the numerous election petitions which were then pending to be tried during the autumn and to suspend the operation of sec. 48 during the adjournment of the session. The trial of this petition was accordingly proceeded with on September 22nd, being a day after the expiration of fifteen days from the day of the adjournment, and all the proceedings which took place on that day were, and are, valid and unimpeachable. The

difficulty which now presents itself arises from the action which was subsequently taken by the Lieutenant-Governor.

Before the day on which, by the adjournment which took place at the trial, the judgment on the reserved charges were to be delivered and the petition disposed of, it was determined, for reasons of State, that the session of the Assembly should not meet again pursuant to its adjournment, but should be prorogued, and it was by proclamation of October 12th, 1898, prorogued, and ended accordingly; and having ended, sec. 3 of the Election Act of 1898, with the proviso which had been added thereby to sec. 48 of the Controverted Election Act, ceased to be any longer in force.

On October 14th, the day which had been already appointed for the purpose, the trial Judges proceeded to give judgment upon the reserved charges and to dispose of the petition, although that was a day which, in consequence of the prorogation, fell within fifteen days after the close of the session. The respondent's counsel objected that if the delivery of judgment was any part of the trial, he was not prepared to consent to the trial being then proceeded with.

The objection, as I have said, is of a strictly technical character, and the circumstances in which it arises are such as would seem hardly to have been in the contemplation of the Legislature under sec. 48. The object, or one object, of that section was that the legislative duties of the sitting member should not be embarrassed or interfered with by the annoyances and distractions incident to the trial of the petition, and that he should have a reasonable time after the close of the session in which to prepare his defence and procure his witnesses. In the present case the actual business of the session was at an end on August 24th, and therefore there was no more inconvenience to the respondent in the trial being proceeded with—if what was done was a proceeding with the trial

—on October 12th, than there was in its having been commenced on September 22nd. Nevertheless, the prorogation was in law the close of the session, and therefore sec. 48, shorn of its amendment, must govern. Unless the giving of judgment can be considered as something apart from the trial within the meaning of that section, or, if it be part of the trial, unless it may be regarded, under the adjournment of September 22nd, as having been given by consent within the section, there would be grave difficulty in upholding the regularity of the proceeding, as it must then have been taken at a time at which by law the trial could not have been legally held: *Smith* v. *Rooney* (1855), 12 U.C.R. 661; *Mallory & Co.* v. *Hiles* (1862), 4 Metc. (Ky.) 53; *Goodsell* v. *Boynton* (1839), 1 Scam. (Ill.) 555; *Galusha* v. *Butterfield* (1840), 2 Ib. 227; *Inhabitants of Springfield* v. *Inhabitants of Worcester* (1848), 2 Cushing 52 (*contra Ludlow* v. *Johnson* (1828), 3 Ohio 553). It is unnecessary to consider whether, assuming the judgment to be part of the trial, the learned Judges could have directed it to be entered *nunc pro tunc* as of September 22nd. They did not in fact do so, and having regard to the nature of the proceedings and the time within which an appeal must be brought, it is perhaps questionable whether that course could have been taken. At all events, another course was open to them, viz., a further adjournment to a lawful day, by which all difficulty could have been avoided.

After some consideration, I have arrived at the conclusion that, on one or other of the grounds I have suggested, the regularity of the decision and of the certificate and report of the trial Judges may be supported. I have already pointed out what appears to be the object of sec. 48, viz., that the respondent shall not be harassed with a contentious litigation which may conflict with his legislative duties. But if the witnesses have been examined, and the cause heard before the commencement

of a session, or—as in the present instance, by force of sec. 3 of the Act of 1898, during the session—nothing remains but to give the judgment of the Court, and to make the certificate and report. The object or purpose of sec. 48 might well be held to be exhausted, there being no reason why, unless the word "trial" *necessarily* includes the final decision and the making of the certificate and report within the meaning of the section, these should not be given and made during the session, or within fifteen days after its close.

"Trial is the examination of a cause, civil or criminal, before a Judge who has jurisdiction of it according to the law of the land. It is the *trial* and examination of the points in issue and of the question between the parties *whereupon* judgment may be given:" Jacob. Law Dict. (1733). "Tryall is to find out by due examination the truth of the point in issue or question between the parties ☞ *whereupon* judgment may be given:" 1 Inst. 124 (*b*), 125 (*a*).

Judgment, according to the well-known definition, is the sentence of the law pronounced by the Court upon the matter contained in the record. There are, no doubt, circumstances in which, having regard to the language of particular enactments, trial includes the sentence or judgment pronounced, for example, after a verdict: see *The Queen* v. *Castro*, 9 Q.B. 350, 358; but the reason of the thing warrants us in saying that the word trial as used in the section in question does not demand so comprehensive an interpretation.

Whether, therefore, we regard the intention of the Act, or the meaning of the word trial as distinguished from judgment, there is nothing in the section which compels us to hold that when judgment has been reserved after the examination of witnesses and hearing, the trial Court is restrained from giving it or from issuing their certificate and report at any time whether during or after a session.

I think, too, that the consent to the adjournment of the case to Toronto to give judgment on October 14th is a sufficient consent, even if the judgment be part of the trial, within the meaning of the 48th section. The power of the Court to dispose of the case then and there, the place being out of the electoral district, depended upon the consent of the parties: sec. 44 Controverted Election Act, R.S.O. ch. 11. I think that consent remained effective to the fullest extent, and was not affected by the accident of the prorogation by which the session was closed before the day appointed for giving judgment.

I therefore proceed to consider the merits of the appeals.

It was found, as I have said, at the trial that two acts of bribery had been committed by agents of the respondent, viz., charge No. 7, bribery of one William Wessler by John R. Eden by payment of two dollars; and charge No. 15, bribery of one Michael Schell by Dr. Hugh G. Roberts by payment of five dollars. Two other charges under items 24 and 25 of the particulars were also investigated. The former comprises a number of charges of what is commonly called treating a meeting, contrary to sec. 161 of the Election Act, R.S.O. ch. 9, and alleges that during the month of February, 1898, the respondent and one J. H. Scully and one John R. Eden and others, his agents, did provide and furnish drink or other entertainment at their expense or at the expense of the respondent to meetings of electors, assembled for the purpose of promoting the election of the respondent, at various times and places during the election.

No. 25 is a very comprehensive particular of corrupt practices forbidden by sec. 162, and sets forth that during the month of February, 1898, and previous to and during the election, the respondent by himself "and through other persons, his agents (*inter alia*), J. H. Scully and John R. Eden, did "directly or indirectly give or provide

or cause to be given or provided, or was accessory to the giving or providing, and did pay wholly or in part expenses incurred for meat, drink, refreshment or provision to and for" a number of persons named, "being voters in the electoral district, in order to be elected or for the purpose of corruptly influencing such persons or other persons to vote for the respondent or to refrain from voting against him at the said election." The times and places where these corrupt practices were charged to have been committed were (*inter alia*) Grosser's Hotel and Albert's Hotel at Bridgeport on February 21st, 1898, and Brohman's Hotel at Winterbourne on February 17th, 1898.

The evidence given applies to the charges under both sections.

The learned trial Judges held that no corrupt practices had been proved under sec. 161, that is to say, that there had been no treating of a meeting. They also held that J. H. Scully had treated or caused to be treated certain electors at Grosser's Hotel and at Brohman's Hotel by furnishing drink to them at these places. They declined, however, to hold that these were corrupt practices under sec. 162 as charged in the particulars, being of opinion, as I understand the language of my brother Rose, that what was done by Scully could not, within the meaning of that section, be said to have been done "by the candidate corruptly by himself or by or with any person, or by any other way or means on his behalf directly or indirectly," that is to say, that Scully was not the agent of the candidate for the purpose of doing the acts in question. In other words, I understand the learned Judges to have been of the opinion intimated by our late brother Patterson in the *Welland Case*, 1 E.C. 383, 408, and elsewhere, that sec. 162 strikes at something done by the candidate himself or by some person expressly or impliedly authorized by him to do that very thing which the section prohibits, so as to make him liable to

the penalty imposed thereby. The learned Judges held, however, that although no corrupt practices under sec. 162 had been committed, what Scully had done was a corrupt practice by an agent under sec. 159, that is to say, bribery, although it is not so charged in the particulars nor was it, as I think, so tried. During the trial it was admitted that, under charge 25, other cases of practically the same character could be proved, not necessarily committed by the agent Scully or precisely similar in their circumstances, but still, as the petitioner would contend, cases of corruptly providing refreshment, contrary to sec. 162; and counsel for the respondent conceded that if the trial Judges held, contrary to his contention, that the two Scully charges were corrupt practices (and, as it seems, corrupt practices of that nature), he would not be in a position to claim the benefit of the saving clause, sec. 172.

Finding, therefore, that four corrupt practices had been proved, viz., two of bribery by the payment of money, and two, as it was considered, of bribery by treating, and that other like cases of the latter kind might have been proved, the learned Judges avoided the election absolutely. There was no finding as to the alleged treating by Eden or by another alleged agent named Sketz, although there is some evidence in the record as to both. The petitioner, however, does not appeal as to either of these charges. His cross-appeal is confined to the questions whether, as to the charges upon which judgment was reserved, the evidence proves an offence by Scully under secs. 161 or 162, or either of them, and whether the election ought to be avoided under the 7th and 15th charges alone. As to so much of the cross-appeal as relates to the charge of treating the meetings at Bridgeport and Winterbourne, I agree with the learned trial Judges that the evidence does not bear it out. The meetings were entirely at an end and broken up, and the persons who composed them had separated, and although many of those who had been

present thereat went from the room in the hotel at which, in the former place, the meeting had been held, to the bar across the passage; and from the town hall, in the latter place, to the hotel, yet the persons treated were not those who composed the meetings, but a "mixed multitude," comprising some of those who had been at the meetings and others who were in the bars and elsewhere about the hotels. We are not to strain the words of the statute, which forbids simply the treating of "any meeting of electors assembled for the purpose of promoting the election." There is no evidence that Scully intended to contravene it by treating the meeting, and it is enough to say that the case is not, as I read the evidence, and as the trial Judges have found, brought within the decisions in the *Prescott* (1 E.C. 88) or the *Muskoka* (1 E.C. 197) cases, where the question was very fully considered by this Court. The decision in the latter case goes to the very verge of the law, and I doubt very much whether the decision of this Court would have been the same if the trial Judges had found differently upon the evidence.

The question of what other offence, if any, is proved by the evidence as to the treating by Scully or at his instance at Grosser's and Brohman's hotel is to some extent involved in both the appeal and cross-appeal. The respondent contends that it shews neither bribery nor an offence under sec. 162, while the petitioner relies upon it as proving an offence under the latter section, which is contrary to the finding of the learned Judges, and he does, though faintly, insist that it may also amount, as they have held, to the offence of bribery. I must say, with the greatest respect for my learned brothers, that I find myself wholly unable to adopt the latter view, which, regarding the evidence, seems to me to confuse two kinds of corrupt practices, the distinction between which is clearly recognized by the Legislature in secs. 159 to 163 inclusive, and to one of which, viz., corrupt treating, no

penalty, as I read the Act, is imposed upon the voter who accepts the treat, which he may do without any intention of acting corruptly and in ignorance of any corrupt purpose or wrongdoing on the part of the treater. The difference in this respect between sec. 162 and the somewhat similar section in the present English Act of 1883, 46 & 47 Vict. ch. 51, s. 1, is noticeable. Corrupt treating, no doubt, in its nature runs very close to bribery on the part of the treater, and may even, as has been said, run into it—at all events, where it is corruptly accepted by the voter—but the circumstances in which a treat can be said to be a *valuable* consideration within sec. 159, so as to amount to bribery on the part of the person accepting it, must be unusual: *The Bodmin* Case (1869), 1 O'M. & H. at p. 124; *The Carrickfergus* Case, 3 ib. 91; *North Ontario* Case, 1 E.C. at pp. 18, 21; see also Rogers on Elections, 17th ed., part 2, p. 296, where it is said "There is a wide difference in the nature of the two offences, both as regards the candidate and the voter. In bribery a corrupt contract between the voter and the candidate for the purchase of a vote usually exists; but not so in treating. Bribery is directed to obtain the adverse, or fix the doubtful voters; treating is resorted to to confirm the good intentions and keep up the party zeal of those believed to be already in the interest of the candidate." If the treating amounts to bribery, the person accepting it must also be guilty of the offence, and upon the evidence in this case it is impossible to say that those who did so were actuated by any corrupt intention or were conscious of any corrupt influence being exerted upon them.

Scully's acts, therefore, in order that they may affect the election, must be such as to constitute corrupt practices within sec. 162. The difficulties in the construction of that section in its relation to sec. 171 have been already adverted to. If Scully was not an agent of the respondent within the meaning of the section, not having acted under

his instructions or authority, so as to render the latter liable to the penalty imposed thereby, and if the respondent was not himself party to his conduct, as the trial Judges have held, then it is contended that as to this there was no corrupt practice by the candidate or his agent within sec. 171 which will avoid the election. I am not disposed, more than was my brother Patterson, to attempt the task of harmonizing these sections unless it be absolutely necessary to do so. Even if we held that Scully's acts were not corrupt practices, or, if they were, that they were not such as would avoid the election, there would remain the question whether the election should be saved, notwithstanding the two acts of bribery by Eden and Roberts, which, for the present purpose, I assume to be the only ones proved. The majority is said to be sixty-five.

Sec. 172 is one which I have often had occasion to consider (in cases reported in 1 Election Cases and subsequently), and never without being pressed with the difficulty there is in judicially acting upon it. It has always been denied that its application is to depend upon the number of corrupt practices proved, or that it must be shewn, as it were, that the entire majority was procured by means of such practices. Then, where is the line to be drawn? If no more than a couple of instances are proved, and the Court can feel convinced that in the circumstances they are isolated corrupt practices committed by persons who were not likely to have gone further, or not having the means of going further, a case would probably be made out, if the majority was a substantial one for applying the section. It might then be safely said that these were trifling in their nature—having regard to the persons who bribed and their means and opportunities of doing or desire to do wrong—and trifling in extent, referring to their number. In this case the acts were committed by persons who were active, and in Eden's case at least,

important agents of the candidate. Dr. Roberts was at least willing in one instance to spend money unlawfully. He does say he did not spend more. While Eden was a person who had access to a fund by means of which he did commit the act of bribery charged. It is said that the expenditure of the fund was vouched for—we do not know how it was expended—but the vouching was done by Mr. Scully, who occupied a very prominent position as agent of the candidate, and the value of his audit is shewn by his having "passed" the item in question here, and perhaps also by his conduct in other respects.

Neither he nor Eden was called at the trial, a circumstance it is impossible not to comment upon. I have not the least conviction that Eden committed no more than the one corrupt practice which has been brought home to him, and I am therefore unable to hold that judgment avoiding the election was wrong. The appeal must therefore be dismissed, and, I suppose, with costs. The cross-appeal, which I regard as entirely unnecessary, must share the same fate.

BURTON, C.J.O.:—

I do not think we can derive much assistance from the decisions as to what would be considered as part of the trial in a suit or proceeding at common law. The question really is, what is meant under the Controverted Elections Act, R.S.O. ch. 11, which is an Act *sui generis*, by the word trial as used in that enactment?

Clause 48 was passed, no doubt, with the object and intention of providing that a member should not, when he was attending to his Parliamentary duties, be liable to be interfered with in order to prepare for the trial by summoning his witnesses or attending the trial, and when we refer to the next preceding section it seems pretty clear, I think, that the actual trial—as that term would ordinarily be understood by laymen—was meant, that is,

an investigation in open Court by the examination of witnesses and the arguments of counsel upon their evidence.

Except in the cases provided for by sec. 48, the trial is to commence within six months, and, so far as practicable, consistently with the interest of justice in respect of such trial, be continued *de die in diem* until its conclusion.

Looking at the object and intention of sec. 48, I think we are best carrying out the spirit of the enactment by holding that the trial referred to meant the examination and arguments, as I have pointed out, and that it was then concluded. The reason for the restriction has ceased when the trial, as understood in a popular sense, is over, the member's presence not being required at the time fixed for the delivery of the decision. I think no injustice can be done by so holding, and as the word will bear that meaning, I am myself disposed to so hold.

The proceedings on September 22nd were perfectly regular, and the parties at the conclusion of the trial having consented to an adjournment to Toronto, a place not in the electoral district, without any qualification, for the purpose of giving an opportunity to the Judges to prepare their decision, ought to be estopped from qualifying it by something which occurred subsequently, especially where the objection is so purely technical.

Upon the merits I agree with the trial Judges that the case is not within sec. 161. Scully, no doubt, intended that any of the voters who were expected to come into town that evening should be treated, probably with the view of making the candidate he was supporting popular, and quite irrespective of whether they attended the meeting or not, and I think it would be carrying this case beyond any previous decision were we to hold that this was a treating of a meeting.

The English Election Act of 1883, 46 & 47 Vict. ch. 51, recognizes the correctness of the decisions under

sec. 4 of the Act of 1854, 17 & 18 Vict. ch. 102 similar to sec. 162 of our Act, by declaring that persons other than candidates were not liable to any punishment for treating, and it was expedient to make such persons liable, and proceeds to enact that "any person who corruptly, etc.," instead of confining it to the candidate. Our Act still retains the words "no candidate," but goes on to provide that "there shall be a penalty of $200," which lends countenance to the view that the agent referred to in that section must be expressly or impliedly authorized to do the particular act. The section should be amended to make its meaning clear. It must be manifest, I think, that no action could be maintained against the candidate for the penalty unless the agent had been expressly authorized, and it could scarcely have been intended that in the same section one agent should require to be expressly authorized, whilst another not so authorized, but who might for some purpose be regarded as an agent within the decisions on the election law, would be guilty of a corrupt practice which might avoid the election.

If it is thought desirable to retain the penalty clause, it would perhaps be better that it should be provided for in a separate section.

As it is not necessary in this case to come to any decision upon the construction to be placed upon the section, I prefer leaving it to be dealt with by the Legislature.

For the reasons given by my brother Osler, I think the saving clause 172 cannot properly be invoked and the judgment should be affirmed.

The cross-appeal was, in my view, unnecessary, and there should be no costs in respect of it.

MACLENNAN, J.A.:—

The appellant's first objection is that prorogation having taken place on the 12th of October, it was not

competent to deliver judgment within fifteen days thereafter, contrary to the prohibition of sec. 48 of the Act, R.S.O. ch. 11. In my opinion there are three grounds on which this objection must be disallowed. The first ground is, that what is prohibited within the fifteen days is the holding of the trial, and I think the delivery of judgment is no part of the trial within the meaning of the section. The point is a very arguable one, but upon the whole I think that is the proper conclusion, having regard to the whole scope of the Act.

The reason for the restriction affords a cogent argument for this conclusion. That appears to be to enable the member-elect, who must be taken to have been duly elected, until the contrary is established, to attend to his duties during the session, and also to prepare for and to attend the trial.

In a popular sense, the trial is over when all the evidence has been given, and the parties have been heard. By sec. 31 the trial is to be *conducted before* a Judge or Judges, etc., and by sec. 39 it shall take place in the electoral district unless, etc., and by sec. 44 it may be adjourned to any other place within the electoral district; but there is nothing in the Act requiring the judgment to be given at the conclusion of the argument, or at any particular time or place. Indeed, I do not find any express provision in the Act, or in the rules, requiring any formal judgment to be given, but what the Judges are to do is prescribed by sec. 55 and the recent amendment thereto. They are to determine certain matters, and to certify their determination to the Speaker, or to the Court of Appeal, as the case may be, and the only enactment which implies that a decision is to be given apart from the report to the Speaker is sec. 66, which provides for a right of appeal within eight days from the day on which a decision is given. No doubt it has always been the practice for the Judges either at the trial, or afterwards,

to pronounce a formal judgment in the presence of the parties, but upon the whole I think that act is not a part of the trial within the meaning of the section. The second ground on which I think the objection fails is that at the conclusion of the trial on the 22nd of September, the 14th of October was fixed by consent for the delivery of judgment. That consent was not qualified in any way with reference to a possible dissolution in the meantime, and I think the appellant is precluded by his consent from taking the objection if it were otherwise open to him. A third ground depends on the language of sec. 3 amending sec. 48, which declares that for the purposes of the amending section, the period of adjournment should not be reckoned as part of a session. The purposes of the section are the trial of petitions, and so although for all other purposes the session continued until the 12th of October, yet for the purpose of trials the time which elapsed between the 24th of August and the 12th of October was no part of the session. For those purposes the session ended on the day of the adjournment, and the fifteen days named in sec. 48 began on that day. Each day that passed after the adjournment was, by virtue of the Act, excluded from being reckoned as part of the session, and that continued until the 12th of October, when the House was prorogued, and the Act ceased to be in force. It cannot be argued that, because the Act ceased to operate any longer, what it had already done was undone or annulled. The Legislature had in effect enacted that, so far as trials were concerned, the session came to an end on the 24th of August, although for all other purposes there had been merely an adjournment. It follows that even if the delivery of judgment was part of the trial, it was competent to pronounce it on the 14th of October.

I now come to the appeal on the merits, and I think it cannot succeed.

I have considered very carefully the evidence, and the arguments addressed to us, and I am of opinion that the election was properly set aside.

The learned Judges came to the conclusion that what was done at Grosser's Hotel at Bridgeport was not a providing of drink to a meeting of electors, assembled for the purpose of promoting the election, within sec. 161 of the Election Act, but was a corrupt practice, that is to say, a case of bribery, within sec. 159. I am, with great respect, unable to agree in that conclusion, and think the facts bring the case within sec. 161, and that Scully was guilty of a corrupt practice in having ordered and paid for the drink which was provided and furnished on the occasion of the Bridgeport meeting. The simple facts were these: There were two election meetings advertised to be held on behalf of the respondent on the evening of the 21st of February, the day before nomination, one at Bridgeport, at Grosser's Hotel, and the other at Bloomingdale, $3\frac{1}{2}$ miles away. James Scully, who was an active agent of the respondent, called at Grosser's Hotel, Bridgeport, about six o'clock in the evening on his way to the Bloomingdale meeting, and stayed about twenty or thirty minutes, and while he was there told Grosser to *treat the boys*, evidently meaning the persons who should attend the meeting which was about to take place. He then went away, saying he would return, but expected to be too late for the meeting. He did return about midnight, enquired of Grosser whether he had given *the boys* a drink, and on being informed that he had, threw him some money, out of which Grosser says he took payment, amounting to something over a dollar; he would not say how much more, but it was not so much as two dollars. The meeting was held in the sitting-room and drawing-room of the hotel, thrown into one by folding-doors, and a hall-way separated these rooms from the bar. Before the business of the meeting began, about twenty or twenty-five

persons were assembled in the bar waiting for the meeting, and these were all treated by Grosser either voluntarily or at the request of Janson, an agent of the respondent. There were from forty to fifty persons at the meeting, and when it was over, from twenty to twenty-five of the persons who were present passed into the bar-room and were there twice treated by Grosser, and these are the treats for which he says he was paid by Scully. After those treats, the same crowd, or many of them, went very much in a body to another hotel, called Albert's, a few hundred yards away, and were there treated again; it is not very clear by whom, and it is not immaterial that the respondent was with the crowd and accompanied them to Albert's and afterwards returned with some of them to Grosser's. Now, what the statute forbids is the providing or furnishing drink *to any meeting of electors* assembled, etc. There can be no question that this was such a meeting as the statute describes, and I feel compelled, by a consideration of the facts which I have stated, and the construction which has been put upon the enactment by the decided cases, to hold that it has been violated. I refer to the *Dundas Case* (1875), H.E.C., pp. 208-10, *per* Spragge, C.; *East Peterborough Case* (1875), ib. at p. 251, *per* Draper, C.J. The *Prescott Case*, 1 E.C. 88, *per* Patterson, J.A., at p. 91, *per* Osler, J.A., at p. 116 (affirmed on appeal). The *Muskoka and Parry Sound Case* (1884), ib., *per* Patterson, J.A., at p. 214, and on appeal, *per* Hagarty, C.J., and Burton, J.A., 226-239. At page 238 the present Chief Justice uses this language: "I should say, therefore, that a very wide meaning should be given to the words of the section with the view to prevent the mischief, and that until the body so gathered together had actually separated, and had resolved itself into its original elements, so to speak, it would be a very dangerous experiment for a candidate to indulge in a general treat to the people thus gathered together, and I think it as well

that it should be generally known that the Courts are disposed to place a very wide construction upon the words with a view to suppress the mischief." In the case in which that language was used, what happened was a good deal like what was done in the present case. The business for which the meeting had been called came to an end, and "nearly all those present crossed the hall and went into the bar-room. The respondent followed, first inviting those who remained . . . to join them; and then in the bar-room, he invited them all to drink, which they did, the respondent paying for the liquor" (p. 214). With reference to that state of facts, the language of my brother Osler in the *Prescott Case*, 1 E.C. at p. 116, is quoted with approval: "Without attempting to lay down any inflexible rule for the circumstances of each particular case as regards the extent of the treating, the question must, in my opinion, always be whether the entertainment has been furnished to *the meeting*, that is to say, to the general body of electors composing such meeting, . . . and while, as a body, such electors remain at the place of meeting or elsewhere." Now, here we have the exceedingly important fact that Scully had previously arranged with Grosser to treat *the boys*. That, obviously, meant the persons who should attend the meeting. We see what Grosser did in pursuance of the arrangement. He is afterwards asked by Scully whether he had done it; he answers that he had, and is paid for it by Scully. It is said that there were forty or fifty at the meeting, and that only from twenty to twenty-five were in the bar-room when the treats were given. But it is also shewn that the bar-room was full; apparently from twenty to twenty-five were as many as could be conveniently admitted. I think it can make no difference that all did not go in. Some might object, and others might not care to accept the treat, but all who were willing had the opportunity, and a large number did accept the invitation, and were treated in a body. Suppose the

arrangement had been to give "the boys" a supper, and tables had been laid in an adjoining room, or an adjoining house, for twenty or twenty-five, and as many as could be accommodated passed from the meeting and sat down, in my judgment it could not be held that such an act would not be within the enactment, and I can see no difference between the case so supposed and the present. In my judgment, therefore, the respondent's agent Scully was properly found guilty of a corrupt practice at Bridgeport, but on a different ground from that upon which the same conclusion was reached by the learned trial Judges. That makes it unnecessary to consider the other case of treating at Winterbourne on the 17th of February, for both at the trial, and on the argument before us, Mr. Aylesworth admitted that if either of the cases of treating was held to be established, he could not claim the benefit of sec. 172, inasmuch as a number of other similar cases of treating had taken place.

I am therefore of opinion that the appeal of the respondent Lackner should be dismissed.

I am also of opinion that even if we had come to a different conclusion on the question of treating, the two charges of bribery which were established at the trial, and as to which there was no appeal, could not, under all the circumstances, be held to be of such trifling nature, or of such trifling extent, that the result could not reasonably be supposed to have been affected within the meaning of sec. 172. The agents who committed those acts of bribery had been very active supporters of Mr. Lackner, and one of the bribes, although it was only a sum of $2, was paid out of a general election fund to which the respondent was a contributor to the extent of $250. Neither the respondent nor the agent was asked to explain or palliate the act. The majority was 65 out of a total vote of about 5000, and I cannot regard such a bribe as one of a trifling

nature within the meaning of the section. The cross-appeal, however, seems to have been unnecessary.

MOSS, and LISTER, JJ.A., concurred in the judgment of OSLER, J.A.* A. H. F. L.

*The charges against Roberts for bribery of Wessler, and against the latter for accepting the bribe, were afterwards, on 27th April, 1900, tried before the Judges who had tried the election petition. Both parties were found guilty, and held to be liable to the statutory penalty. They applied at the trial for relief against the penalties. The Court, giving credit to the evidence of the defendants, held that there had been no intentional violation of the law; that the violation did not involve moral culpability, and had not affected the result of the election; that the trial, being a new and independent proceeding on which, for the first time, the defendants had an opportunity of being heard, the Court, without reference to the findings at the trial and to the decision of the Court of Appeal on that matter, was at liberty to apply sec. 177 of the Election Act and to free the defendants from the disabilities imposed by that section, and under sec. 57, sub-sec. 3, of the Judicature Act, to relieve them from the penalties, which was accordingly done.

EAST ELGIN.

PROVINCIAL ELECTION.

BEFORE OSLER, J.A., AND MACMAHON, J.

ST. THOMAS, *November 28, 29, 30, and December 1, 1898.*
TORONTO, *December 27, 1898.*

BEFORE THE COURT OF APPEAL.

Present:—BURTON, C.J.O., BOYD, C., MACLENNAN, MOSS, AND LISTER, JJ.A.

TORONTO, *September 18, 1899, and November 14, 1899.*

MATTHEW EASTON, *Petitioner*, v. CHARLES A. BROWER, *Respondent.*

Corrupt Practices—Voting Without Right—Knowledge—Bribery—Inference from Evidence—Providing Money for Betting—Loan—Agency—Proof of—Party Association—Saving Clause—Election Act, secs. 164 (2), 168, 172.

It was charged that a person had voted at the election, knowing that he had no right to vote, by reason of his not being a resident of the electoral district. He knew that his name was on the voters' list, and that it had been maintained there by the County Judge, notwithstanding an appeal, and he believed that he had, and did not know that he had not, a right to vote:—

Held, affirming the decision of the trial Judges, that a corrupt practice under sec. 168 of the Election Act, R.S.O. 1897 ch. 9, was not established. Under that section the existence of the *mala mens* on the part of the voter, "*knowing* that he *has no right* to vote," not merely his

knowledge of facts upon the legal construction of which that right depends, must be proved. The offence does not depend upon his having taken the oath; it may be proved apart from that; nor does the fact that he has taken the oath, even if it be shewn in point of law to be untrue, necessarily prove that the offence has been committed.

Haldimand Case (1888), 1 Elec. Cas. 529, distinguished.

2. *Held*, affirming the decision of the trial Judges, that the bribery by L. of two persons to abstain from voting against the respondent was established by the evidence, although it was not shewn that anything was said to them about voting; L. having paid them, for trifling services which he engaged them to perform upon election day, sums considerably in excess of the value of such services, knowing them to be voters and to belong to the opposite political party.

3. As to the agency of L., it appeared that the respondent was brought into the field as the candidate of his party, having been nominated at a convention of the party association for the electoral district; L. was not a delegate to, nor was he present at, the convention; and he was not upon the evidence connected with the association or its officers; he was not brought into touch with the candidate, nor any proved agent of his, either as regards his or their knowledge of the fact that he was working or proposing to work on behalf of the candidate, or as regards any actual authority conferred upon him to do so. But he was present at three meetings of electors when the voters' list was gone over; he acted as chairman of a public meeting called in the respondent's interest; he canvassed some voters; and, from his antecedents, the respondent hoped or believed or expected that he would be an active supporter:—

Held, affirming the decision of the trial Judges, BOYD, C., dissenting, that L. was not an agent of the respondent.

Haldimand Case (1880), 1 Elec. Cas. 572, distinguished.

4. Three persons, T. being one of them, each lent $10 to R. L., knowing that the moneys so lent were intended to be used by him, as he then told them, in betting on the result of the election. Any bet or bets which he made were to be his own bets, not theirs, and he was to return the money in a couple of days. He did not succeed in getting any one to bet with him, and he returned the money to each on the following day:—

Held, affirming the decision of the trial Judges, that this was providing money to be used by another in betting upon the election, and was a corrupt practice within the meaning of sec. 164 (2) of the Election Act.

5. As to the agency of T., it appeared that he was one of the local vice-presidents of the party association above referred to; he had been present at two meetings of local party men calling themselves a "Conservative Club," who were interesting themselves in the election, and had contributed towards the cost of hiring the club-room; at these meetings he had gone over the voters' list with others, which was the only work done; at a meeting held by the respondent in the place where T. lived, he had presided, having been elected chairman by the audience, and he made a speech introducing and commending the respondent; before the meeting he had met the respondent in the street, had shaken hands with him, and asked him how things were going. The respondent did not know that T. was local vice-president, and had never heard of the "Conservative Club." T. was not a delegate to the nominating convention nor present thereat. The association, as such, was not charged with any definite duty in connection with the election except the selection of a candidate:—

Held, reversing the decision of the trial Judges, BURTON, C.J.O., and MACLENNAN, J.A., dissenting, that T. was an agent of the respondent.

6. The total vote polled was over 4,500, and the majority for the respondent was 29. The trial Judges had reported one person guilty of an act of undue influence, three of being concerned in acts of bribery, and T. and two others of providing money for betting :—

Held, that sec. 172 of the Election Act could not be applied to save the election.

The facts are stated in the judgments.

Aylesworth, Q.C., and *R. A. Grant*, for the petitioner.

Wallace Nesbitt and *E. A. Miller*, for the respondent.

OSLER, J.A. :—

THIS petition was tried before my brother MacMahon and myself at St. Thomas on the 28th, 29th, 30th November, and 1st December, 1898. The particulars contain nearly one hundred charges of corrupt practices, a large number of which were tried out, and all of which were dismissed except No. 34, which was proved as to the offence but not as to the agency, and Nos. 12 and 13, 26, 27, and 30, No. 39, and a charge which the petitioner was allowed to add by amendment. Judgment on these seven charges was reserved until to-day, and we now proceed to dispose of them in their order.

No. 12 : that on the day of the election Hugh Douglas, formerly of the township of South Dorchester, but then and now of the township of Dereham, in the county of Oxford, an agent of the respondent, voted at the polling station No. 1, South Dorchester, knowing that he had no right to vote thereat, by reason of his not being a resident of the electoral district.

No. 13 : that John Eden, an agent of the respondent, induced and procured said Douglas to vote, he, said Eden, knowing that he had no right to vote by reason of his being a non-resident as aforesaid.

Both of these charges are founded upon sec. 168 of the Election Act, R.S.O. 1897 ch. 9, which enacts : " Every person who votes at an election knowing he has no right to vote at such election and every person who induces or

procures any other person to vote at an election, knowing that such other person has no right to vote at the election, shall be guilty of a corrupt practice, and shall be liable to a penalty of $100."

The voter was a young man of 26 years of age. He was married, but continued, notwithstanding, to reside, as he had always done, with his father in South Dorchester, and his wife resided with her mother in a different electoral district, as their circumstances did not permit of their taking up house together. He from time to time made brief visits to his wife at her mother's house, staying perhaps a week on each occasion.

At the time fixed by statute, viz., 15th February (Assessment Act, sec. 55), for beginning to make the assessment roll for the township of South Dorchester for 1897, on which he was entitled to be entered as a person qualified to vote (sec. 8, proviso (1) of the Election Act), he was a resident of the Province. He was also then a resident of and domiciled in that municipality (sec. 8, proviso 2). He was also at the time of tendering his vote a resident of and domiciled within the same municipality, and therefore within the electoral district of East Elgin (sec. 8, proviso 2).

It may admit of question whether he had, within the meaning of sec. 8, proviso (1), so *resided* within the Province for nine months next preceding the 15th February, 1897, or for twelve months next preceding the time up to which a complaint might have been made to the County Judge, under secs. 17-20 of the Voters' Lists Act, R.S.O. ch. 7, to insert his name on the voters' lists. In the present case this date is said to have been the 29th July, 1897, though it was not so proved in fact, as the date of posting up the voters' list prepared by the clerk of the municipality under sec. 6 of the Voters' Lists Act, which depends upon the date when the assessment roll has been finally revised (Assessment Act, sec. 71 (19)), was not shewn. See sec. 8,

Voters' Lists Act. There is no doubt that, although his home and residence, using the latter expression in its legal signification, was in South Dorchester, the voter had for a considerable part of either period prior to the month of October, 1896, been absent from the Province on a temporary visit to some friends in the State of Wisconsin, U.S.

It may also be a question whether he could, within the meaning of the latter part of the second proviso of the above section, having regard to sec. 11 of the Act, be said to have resided continuously within the electoral district from either of the above dates up to the time of tendering his vote, owing to the fact that he had occasionally visited his wife for a few days in another electoral district, and had been absent on another visit to Wisconsin for a fortnight, and also for other brief periods been absent on business in a neighbouring district, always returning to his home and residence at his father's house.

The vote, however, not having been attacked by either party to the petition, it is not necessary, in the view I have always taken of the proper meaning of sec. 168, to decide either of these questions.

The voter was on the voters' list in fact, and his right to be there appears to have been the subject of an appeal to the County Judge, on the ground, as it was said, though, I think, not legally proved, of his non-age. The objection as to his non-residence in the Province for the requisite time, nine months or twelve as the case might be, was open, though it may not have been taken. At all events, the voter knew his name was on the list, and that it had been maintained there by the County Judge, notwithstanding an appeal, and both he and the scrutineer Eden deposed, and I believe them, that they believed that he had, and did not know that he had not, a right to vote at the election. Had the Legislature intended that the taking, however honestly, of an oath (Form 16 of the

Act) untrue in point of fact, whether as stating a legal conclusion from facts or as misunderstanding the words "residence," "domicile," etc., should constitute the corrupt practice indicated by sec. 168, they would probably have said so. But this they have not done nor alluded in any way in that section to the form of the oath or the section under which it may be administered (sec. 98). The language they have used, especially in view of the fact that the section imposes a penalty upon the voter, indicates that what is to be proved, in order to establish the commission of the offence mentioned in the section, is the existence of the *mala mens* on the part of the voter, "*knowing* that he *has no right* to vote," not merely his knowledge of facts upon the legal construction of which that right depends. The offence does not depend upon his having taken the oath; it may be proved quite apart from that. But, also, the fact that he has taken the oath does not, even if it be shewn in point of law to be untrue, necessarily prove that the offence has been committed.

The decision in the *Haldimand Case* (1888), 1 Elec. Cas. 529, which was relied upon for the petitioners, went upon the somewhat corresponding section of the Dominion Act, the language of which, however, is different from ours, and may admit, as it did, of a different construction; although, if I may with all respect say so, I prefer the opinion of the dissenting Judges to that of the majority. I have been a party to the construction I now place upon sec. 168 in several cases*—*inter alia*, the Kingston election, 1891 or 1892, and I think also at the trials of the North Bruce and South Bruce election petitions about the same time, though I am unable to refer to the opinions I then wrote on the subject in consequence of the destruction of my note-book at the Grand Trunk Railway accident at Weston three or four years ago.

* See the South Perth Election Case, ante p. 30.—REP.

These two charges therefore ought, in my opinion, to be dismissed. I may add that there was no evidence whatever of agency in respect of charge No. 12.

Charges 26 and 27 and charge 30 and the added charge may conveniently be taken together, as they are all charges of bribery in one form or other by one W. F. Luton.

I am of opinion that the two latter are not made out. Charge 30 alleges bribery of one Egbert Pettit by paying him $30 for a cow worth no more than $23, the difference of $7 being paid to induce Pettit to vote for the respondent. I am not satisfied that the animal was not in fact reasonably worth the former sum, or that Pettit's statement as to Luton having said to him, when he first proposed to sell the cow, that he would give him $30 if he would vote for Brower, which would leave her worth $23, can, in view of all the circumstances, be relied on. I find the charge not proved.

So also as to the added charge: an offer to give one Duncan Doan time on a small note he owed Luton, if he would stay at home and not vote. I disbelieve Doan's evidence as to this, and the charge is categorically denied by Luton, as indeed is also charge 30.

I would, therefore, dismiss both of these charges.

Charges 26 and 27 are of a more formidable character.

No. 26 is a charge of bribery of one William Follock by hiring him to work for a few hours on the polling day and paying him $5 therefor, but which payment was in reality made to induce him to vote for the respondent or to refrain from voting against him.

No. 27 is a similar charge in respect of William Follock junior, a son of the person mentioned in charge 26, by hiring him to work at Luton's house on polling day and paying him $5, in reality to refrain from voting against the respondent.

The following may, I think, be taken as a fairly accurate summary of the evidence on these charges.

Luton knew that Follock and his son always, as he says, "voted reform."

Follock senior said that Luton met him a day or two or three before the election, at, I think, the shop of one Boughner, where several people were gathered, and some desultory "election talk" was going on. Luton spoke to him about working for him. He had done some jobs for him some years before—not recently. Wanted to know what he would take to work for him on the following Tuesday (1st March). Follock said $5, which Luton said he would not give. On the night before the polling day Luton, with one Nelson Penhale, came to his house about ten p.m. Witness was in bed, but came down, hearing talk going on. Luton asked him if he had come down in his price. He said he had not. Luton then said he wanted him to go to look at a drove of cattle at John Black's, near Belmont, and let him know what they were like. He (Luton) just "picked on" the following day, saying "to-morrow." Luton paid him $5 that evening. Witness had "been in the cattle business all his life," but admitted that he knew no more about cattle than any other farmer, and his business was not that of a buyer or dealer in cattle. Still, he thought himself a pretty good judge of them. He went to Black's the next day, a distance of six or seven miles; drove his own horse; left his house about 1 p.m., and returned about 4 p.m. There was no reason why he should not have gone to the poll before he left or after he came back, or on the way to Black's. He did not vote. When he got to Black's he found that Black had no cattle to be looked at, having sold the last he had some days before. In "ordinary time" $1.50 would have been enough for what he did, though, if he had "seen the cows and judged them, $5 would be little enough." He reported the result of his journey to Luton about 5.30 p.m. Had not heard Luton talking election at all, and nothing had been said about his vote.

Black said he had had a few cattle for sale in February or March, but never any talk with Luton about them or any dealings with him. $2 would be sufficient pay for going out and judging such a herd as he had, though $5 would not be too much for any one who went out to buy them. This I understood the witness to mean as a sort of commission.

Nelson Penhale said that Follock got some money from Luton—he did not see the amount—to go over to Black's to buy cattle the *next day*. He thought one or two dollars would be sufficient pay, though he had known a higher price paid as a commission per head.

Charge 27. Follock senior said that after his conversation with Luton when the question of his own employment was first mentioned, Luton asked him where his son, Wm. Follock junior, was, as he wanted to see him.

Follock junior, who resided with his father, said that on the day before the election Luton met him at the blacksmith's shop and asked him if he wanted work. He (Luton) said he had a load of corn to unload. Witness said he did not know that he did or whether he would go or not, remarking (to himself) that it might interfere with his vote. In the evening of the same day, being the same occasion as that spoken of by the father, Luton came with Nelson Penhale to his father's house and again asked witness if he wanted to work for him next day. Witness said he would, but wanted $5. Luton then said he wanted him to come and look after his house, as his family would be away. Nothing was said about payment for his services, nor about the election, nor about unloading corn. Witness said he would work, but wanted $5; did not want it for his work, but did not say so. A dollar and board would be about the usual charge for such work as he did, chores about the house, looking after the horses, etc. It was "a borrow;" nothing said about returning any of it. Witness drove to Luton's place with him that night and

returned the following evening. When at Luton's he was five or six miles distant from his own polling place. He did not vote. Along in the summer he returned $4 to Luton, keeping $1 for his day's work. Luton had not asked for it.

Nelson Penhale said Luton told young Follock that he wanted some one to keep house for him or take care of his house, or to get some help, for the next day, and Follock said he wanted some money. Saw money given to him. Nothing was said about voting on the election day.

For the defence Luton was called. As to Follock senior, he denied the conversation first spoken of by him, though he admitted that he did speak to him (I think in Boughner's shop) on the day before the election about working for him, and asked if he knew whether Black had disposed of his cattle or not. He said nothing one way or the other to him about voting. The visit to Follock's house in the evening is not denied. He spoke to him there about going to look at and value the cattle. That was what Follock wanted the $5 for. He did not try to beat him down. He was not to buy the cattle. The charge was a fair one. He had not suggested to Follock to go on any particular day. It was his own idea to go the next day. Had never bought cattle from Black, nor employed Follock on such business before. As to Follock junior, he had asked the father what the son was doing, and had met the latter in the street soon after near Boughner's store. Asked him if he could help him to-morrow, and he said he could as far as he knew. Nothing then said as to terms. In the evening he saw him at the father's house, where he paid him what he asked, viz., $5. This would be too much for such work as he wanted him for—just woman's work about the house. $1.50 would be a fair day's wage. Did not expect he would have more. Witness does not say that the difference between this and the $5 was a loan or was to be

returned. $3.50 was returned, he thinks, before it was known or before he knew that there would be any trouble about the election. He does not say he had asked for it.

I have given this evidence a great deal of consideration, and am obliged to say that the impression I formed from it at the trial has not been removed. I think that the only inference to be drawn from it is that the money paid to each of the Follocks was so paid to induce them to refrain from voting against the respondent. The fact that nothing was said about voting is not enough to overcome the inference to which the other facts, to my mind, very plainly point. Here were two voters known by Luton to be on the opposite side to that in which he was interested, and he sees and follows them up, on the day before the election. Having approached them once, and in a way which did not indicate any pressing necessity for employing them immediately, he goes after them to their house at an unusual hour for doing business. He sends Follock senior on an errand the following day, from which I am convinced from all that occurred, looking at Black's evidence and his own, he had no reason to expect any result, and he pays him therefor a sum wholly disproportioned to anything like a fair remuneration for the service he was asked to perform. There was no reason why Follock senior should not have voted if there had not been a very good understanding, in whatever way it may have been arrived at, that he should not do so. I have not referred in the summary of the evidence given above to the circumstance of Luton having procured Follock to make a declaration exonerating him in effect from any corrupt practice in connection with the matter, but, so far as it has any weight at all, it seems to reflect unfavourably upon Luton as an attempt to make evidence in his own favour. Nor have I alluded to the details of a conversation in Boughner's store, spoken of by Follock senior, in reference to voting and to Randal Clun's vote. Luton is entitled to the benefit of

having denied this, and I prefer to leave the facts which are practically admitted by him and the two Follocks to speak for themselves.

As to Follock junior, the case is, if possible, stronger. There is first the talk about wanting him to unload a car of corn, which was not referred to at the subsequent interview in the evening. If there was any car of corn to be unloaded, it was evidently not a matter for which all other business the next day had to be laid aside. That, however, was not thought of at night, but the young man was employed six or seven miles away from his polling place to do women's chores about the house, in my opinion, simply for the purpose of getting him away and not because there was any special necessity for his being there. He was given just what he asked for, $5, about $4 more than any such service as performed was worth—admittedly not for that service, but apparently merely because he asked for it. He puts it on the ground that it "was a borrow," as he termed it, but Luton does not say so, nor did the witness ask it as a loan, and he returned $4—or, as Luton says, $3.50—though there had been no agreement to do so nor had Luton asked for it.

Each of these cases throws light upon the other, considering the relationship of the parties and the circumstances under which Luton employed them and his knowledge of their politics, as evidencing the interest of the latter in making the arrangements he did with them.

I am of opinion, therefore, that charges 26 and 27, so far as the corrupt practice alleged in each is concerned, are proved.

The next question is as to Luton's agency.

Mr. E. A. Miller, who was the respondent's financial agent, said there had been a "Conservative Association" in the East Riding, which, however, seems to have been of a very unsubstantial and indefinite description. There was nothing in writing to witness to its existence, no

roll of members, and no membership fee. It was supposed to meet once a year, but its last meeting was in December, 1896. There was a president, whose name, I think, was not of sufficient importance to be mentioned; the witness was the secretary-treasurer; and in each municipality a vice-president or chairman. This set of officers does not appear to have been regularly kept up, and each municipality, so far as the witness knew, looked after its own organization. At the nominating convention, 27th October, 1897, witness believed that there were several delegates from each polling subdivision in a municipality, but there appears to have been no scrutiny of their credentials, except perhaps in five or six instances. The meeting was called by notice in a newspaper, and there were perhaps 300 persons present of both sides of politics, but not more than eighty-seven delegates. When the nomination was tendered to the candidate, he made a short speech to those present, in which he is reported to have said that, with their help, he was confident of victory. I have, I must say, no confidence that we have anything like an accurate report of what was said on the occasion. There was no evidence that the association spoken of by the witness had taken any part in the work of the election. For any purpose of that kind it was not in existence.

W. H. Elliott was chairman or local vice-president in Yarmouth township. Had received notice from Miller to notify the chairmen of the polling subdivisions to send delegates to the nominating convention. Some of those to whom he sent notice were delegates at the convention; among others, A. A. Luton and Wm. Padden. W. F. Luton was not one of these. There was no organization of any kind in this township that the witness knew of. There were two or three informal voluntary gatherings of a few persons, recognized as Conservatives, at private houses—one at A. A. Luton's, one at Wm. Padden's, and another at W. F. Luton's. The latter, however, seems to have been

quite as much of a social as of a political character. At these meetings a voters' list was gone over to see who had a right to vote, etc. The witness did not know of any work which W. F. Luton had done during the election.

George Westlake was a voter in the same polling division as W. F. Luton. He did not remember seeing him at Padden's or A. Luton's. The election was talked of and a voters' list gone over, but no duties were assigned to any one or arrangement made for getting out the vote. He also knew nothing of W. F. Luton doing any work at the election.

George Cline was at the meeting at W. F. Luton's house. Thought it was the night before the nomination. Did not remember of Luton taking any part in it or of being at the table where the voters' list was, or of his having done any work at the election. The persons present were the most active Conservatives in the neighbourhood. There was no assigning of work to be done by any particular person, though witness undertook "of his own notion" to go and see one or two voters.

Daniel Macintyre, the defeated candidate, said he had held a public meeting at a schoolhouse in the village of Middleton, at which perhaps one hundred persons were present. W. F. Luton was in the audience, near the door. When the meeting was over, he called out that the respondent would hold a public meeting there on the following Saturday, and he (Luton) wanted them all to come.

Brower, the respondent, said that he announced at the meeting held after the nomination that he intended to make a personal canvass, and this is what he tried to accomplish until he was taken ill. He had no organization of his own, and no reports were made to him. Met Luton only once during the election. Had no conversation with or communication from him on the subject, and was not aware of any work he did or that he was working for

him; hoped, or expected, or believed—I think he used all three expressions—that he would be an active supporter. Had had some trifling difference with him, and if he did not see fit to support him, would not ask him to do so.

In his examination for discovery the respondent said that at former elections he had always considered Luton an active supporter of his; no one there more so.

Luton himself, called by the petitioner, said he had been present at the meetings at his cousin Arthur Luton's, Wm. Padden's, and at his own house. Some one had a voters' list on each occasion. It was not his, and he had not had one in his possession. He took no part in going over it. Others were doing so. He had not, to his recollection, contributed any information on the subject, and no work was assigned to him by any one. He had not been a delegate to nor present at the nominating convention. He was present during part of the time at the meeting afterwards held at which Brower was tendered the nomination. He went there as a spectator merely, and was not there while the candidate was speaking. He denied Macintyre's statement that he had called out to those present at his meeting to come to the meeting afterwards to be held by Brower. At one public meeting held in Brower's interest he was present, and was called upon to act, and did act, as chairman in the absence of the person who was to have done so. Brower was not there. He drove two voters up to the poll by way of giving them a ride there, but had not gone out for the purpose of driving voters. He had not canvassed their votes. He did no other election work on that day.

I think it is proved that he canvassed four voters in fact, by asking for their votes or suggesting that they should vote for Brower. These, however, were isolated occasional acts, not done as part of a general system of canvassing, or because Luton had been asked by any one to see the voters in question.

What is relied upon, therefore, as establishing his agency seems to be:—

1. That he was present at three meetings of electors when the voters' list, at all events, was gone over, even if no other work was done.

2. That he acted as chairman of a public meeting called in Brower's interest.

3. That he did in fact canvass some voters; and

4. That from his antecedents, the respondent hoped or believed or expected that he would be an active supporter.

I do not think it necessary to go over the cases in which the principles of what constitutes election agency have been discussed, and, still less, cases in which this or that particular circumstance or set of circumstances have been held sufficient to establish it. "It has never yet been distinctly and precisely defined what degree of evidence is required to establish such a relation between the sitting member and the person guilty of corruption, as should constitute agency. . . No one yet has been able to go further than to say, as to some cases, enough has been established; as to other, enough has not been established to vacate the seat:" *per* Blackburn, J., *Bridgewater Case* (1869), 1 O'M. & H. at p. 115.

What the decisions do establish, as I read them, is that there must be circumstances proved from which the authority of the person acting is shewn or may be implied —circumstances which shew knowledge on the part of the candidate or of some authorized agent of his—knowledge which he has, or would have, unless he closed his eyes to it—of the part which the person whose agency is sought to be established *is taking* in the election.

I refer, without quoting at large, to the chapter on agency in the last edition (the 17th) of Rogers on Elections, pp. 360-376, and to the judgment of Ritchie, C.J., in the *Haldimand Case* (No. 2) (1890), 1 Elec. Cas. 572.

Under the circumstances of this case, it appears to me

that the facts I have referred to, whether taken singly or together, are insufficient to establish Luton's agency. He certainly was not one of those persons who could be said, by reason of any general observations of the respondent at the meeting at which he accepted the nomination, to have been invited to support and to work for him. He is not brought into touch with the candidate or any person or persons proved to have been his agents, either as regards his or their knowledge of the fact that he was working or proposing to work on behalf of the candidate, or as regards any actual authority conferred upon him to do so. Much reliance was placed on the evidence of what took place at the so called committee meetings at which Luton was present. He is not, indeed, proved to have taken part in anything which was done at these meetings or to have been intrusted thereat with any work to be done in furtherance of the election. Had the persons who were present at these meetings been a committee intrusted by the candidate with the work of the election, or meeting with his knowledge for the purposes of the election, something might have been said in favour of holding that all those who attended as members of it were his agents, though I am myself inclined to doubt whether mere proof of membership alone, without more, is sufficient for that purpose: *Westminster Case* (1869), 1 O'M. & H. at p. 92; *Windsor Case* (1874), 2 O'M. & H. at p. 89. But it is, in my opinion, wrong to speak of the casual (as they may be called) gatherings at private houses as meetings of a committee. They were not composed of any definite number of persons, meeting at any known or recognized committee-room, but were a fluctuating body of people gathering first at one farmer's house and then at another's, apparently without any preconcerted arrangement. So far as they can be regarded as having the character of a committee at all, they were a self-constituted one, of whose existence the candidate was undoubtedly ignorant, and

they were not, either as a body or individually, merely by reason of their so meeting together, his agents.

As regards Luton's acting as chairman at a public meeting called in the respondent's interest, it is no more than any other respectable friend of his might have been requested by those present to do. It seems to me a circumstance of no weight. He was not appointed because he was an agent, and the appointment did not make him such.

As to canvassing: in describing what was done, I have sufficiently stated the grounds on which I think it cannot affect the candidate. The acts done in this direction were not only not authorized, but were isolated and not part of a general system of canvassing which might be inferred to have come to the knowledge of the candidate or some authorized agent of his. I refer to the *Wigan Case* (1881), 4 O'M. & H. at p. 13, *per* Grove, J.

The *Haldimand Case* (No. 2), already cited, was relied upon by the petitioner. It is perhaps enough to say of it that the present case does not come up to it upon the facts proved. It really, however, establishes nothing new, and proceeds indeed, as I read it, simply upon the principle, when in doubt, especially as to the propriety of a finding of fact—affirm.

I hold, then, that Luton was merely a volunteer, and that charges 26 and 27 fail as to proof of agency, and must be dismissed.

The only charge remaining is No. 39, viz., that on or about the election day, John Ferguson, Alexander Taylor, and Albert B. Day, agents of the respondent, did advance a sum of money to Rudolph Long, sailor, all of Port Stanley, to be used by him in betting or wagering upon the result of the election or upon an event or contingency relating thereto.

The petitioner's case is that this is a corrupt practice within sec. 164, sub-sec. (2), of the Election Act.

Of this section the first sub-section enacts that *every candidate* who *makes a bet or wager* upon the result of the election, etc., shall be guilty of a corrupt practice.

Sub-section 2: "Every candidate or other person who *provides money to be used* by another in betting or wagering upon the result of an election to the Legislative Assembly, or on any event or contingency relating to the election, shall be guilty of a corrupt practice."

Sub-section 3: "Every person who *for the purpose of influencing an election* makes a bet or wager on the result thereof, in the electoral district or any part thereof, or on any event or contingency relating thereto, shall be guilty of a corrupt practice."

The section, therefore, provides for three cases: 1st, that of betting by the candidate himself, which is declared without qualification to be a corrupt practice; 2nd, in sub-sec. (3), betting by any one for the purpose of influencing the election—in other words, bribery by means of betting; and 3rd, in sub-sec. (2), *providing money to be used by another* in betting or wagering upon the result of an election, which is also declared to be a corrupt practice.

I find as a fact that, at Rudolph Long's request, John Ferguson, Alexander Taylor, and Albert B. Day, did, each of them on the same occasion, lend to him the sum of $10, and that they knew the moneys so lent were intended to be used by him, as he then told them, in betting on the result of the election. Any bet or bets which he made were to be his own bets, not theirs; and he was to return the money thus procured from them in the course of a couple of days. In fact, he did not succeed in getting any one to bet with him, and he returned the money to each of them on the following day. It may be added that Long only borrowed from them because it happened at the moment to be too late in the day for him to get his own money out of the post-office, where it appeared to have been deposited.

It appears to me to be very difficult to say that the transaction which I have thus described and found to have taken place is not a corrupt practice within the meaning of sub-sec. (2). The word used there is of large signification—provide—which would cover the case of giving or lending money. There is no corresponding enactment in the English or Dominion Acts, so far as I can ascertain. Mr. Nesbitt urged that it should have been proved that the money lent had been actually used in betting; or else that the corrupt practice intended was the lending of money to be used in betting for the lenders. I do not think this is what the sub-section means. Its language is quite plain. It strikes at an act or practice which, if not forbidden, would be very likely to be resorted to as an easy method of procuring money to be used for the purpose of bribery. Except in the case of the candidate himself, it is not forbidden simply to make a bet upon the result of the election. But, when it is made for the purpose of "influencing the election," it becomes a corrupt practice and criminal, by whomsoever it is done. One who employs his own money, however acquired, in betting, may or may not, according to circumstances, be committing a corrupt practice; but one who has lent him the money wherewith to do so has, at all events, provided him with means, or a fund, which, without the possibility of any control by the lender, he may mis-employ. If we are to look for the reason of the enactment, this seems to lie on the surface; but its language, as I have said, is plain, and on the facts I must hold the case within it. It is not necessary to prove that a bet, corrupt or otherwise, was actually made by the borrower. The corrupt act is proved as soon as it is shewn that the money has passed beyond the control of the lender, and has thus been placed in the borrower's power to use it for an improper purpose.

The corrupt practice charged against Ferguson, Day,

and Taylor is therefore proved; but as to Day and Ferguson there is no evidence whatever of agency.

As to Taylor, the evidence is that he was a vice-president or chairman of the county organization; that he had been present at two meetings of Conservatives in Port Stanley, calling themselves a "Conservative Club," who were interesting themselves in the election—once at a room which they had hired, and once in Day's shop, where they had assembled because the room was not ready for them. Taylor had afterwards contributed towards the cost of hiring the room. At these meetings nothing else was done but to go over the voters' list. No work was assigned to any one, nor arrangements made for doing anything in connection with the election. Taylor had gone over the lists with the others present, or some of them, and he had acted as chairman of Brower's public meeting in Port Stanley. He had done no other work in connection with the election, either in canvassing votes or otherwise. He was not a delegate to the nominating convention, or present thereat, or at the meeting at which the nomination was tendered to Brower. He met Brower once only during the election, on the evening of the public meeting, and had shaken hands with him, and asked him how he thought the election was going, but otherwise had not spoken to him on the subject of the election. Brower deposed that he did not know that Taylor was vice-president or local chairman of the county organization, and had never heard of the existence of the "Conservative Club" until the trial.

I have not been free from some doubt and anxiety as to the way in which this evidence as to Taylor's agency ought to be dealt with. On the one hand, we should be careful not to decide anything which may tend to weaken the principle on which the doctrine of election agency depends, and on the other, not to infer agency so as to avoid an honest election, which I think this election was,

where the evidence does not, I may say, irresistibly require such an inference to be drawn. It is not improbable that other Judges may feel themselves at liberty to decide differently; but upon the whole, after a good deal of consideration, I am firmly of the opinion that the right conclusion is that Taylor was a person for whose acts the candidate is not responsible.

The condition which appears to me essential to establish agency on the part of the person charged with a corrupt practice, I have already referred to in dealing with the Follock charges, and I think it is wanting in reference to this charge, as I have held it to be in those. The respondent was ignorant that Taylor was the local chairman or vice-president of the county organization, if indeed that be important, as that association was not charged with any duty in connection with the election, except as regarded the selection of a candidate. He was in that respect only in the position of a person who might have been appointed as a delegate to the nominating convention. Neither the candidate nor any person proved to be an agent of his is shewn to have been aware of the existence of the "Conservative Club," which, apart from the fact that they hired a room, appears to me to have been quite as much a self-constituted committee as those I have formerly dealt with. Except in going over the voters' list, Taylor did no work in connection with the election; no other duties were assigned to or assumed by him; and there is no proof that the candidate, or any other person for whose acts he was responsible, knew that he had even done this. I cannot hold that his presence as chairman at a meeting called by the candidate makes him an agent. He was chosen by the meeting, and it seems to me it would be going very far to say that such a circumstance implied any authority from the candidate to act as his agent thereafter.

Proof of Taylor's agency failing, this charge must also be dismissed.

We therefore hold that the election and return complained of are a valid election and return, and dismiss the petition with costs.

MacMahon, J.:—

I agree in the judgment by my learned brother Osler, and have to add but a word regarding the Taylor charge, to which I gave much consideration, and, after fully sifting the whole evidence relating thereto, conclude that it falls short of what would warrant me in saying that it made him out an agent for the respondent.

The petitioner appealed, and his appeal was heard in the Court of Appeal on the 18th September, 1899.

Aylesworth, Q.C., and *R. A. Grant*, for the petitioner.

Wallace Nesbitt and *Falconbridge*, for the respondent.

Burton, C.J.O.:—

The only points remaining for decision are the agency of Luton and Taylor. The evidence of corrupt practices was clear, and no grounds have been shewn for interfering with the judgment of the learned trial Judges in that respect.

I agree that great caution may be necessary in applying some of the decisions in the English cases under the system generally prevalent in this Province as to the mode of selecting the candidate and the machinery for conducting the contest, and I agree also in the remarks of the late Mr. Justice Patterson, which I quote as follows: "If I find that a candidate who takes the field as the nominee of a party that acts through an organized association, whether the organization is strict and formal, or loose and elastic, depends upon the efforts of the association to promote his election, or relies upon such

efforts, I must, as I understand the principles of the law, hold all persons accredited by the association to be the agents of the candidate :" *Haldimand Case*, 1 Elec. Cas. at p. 594.

I am also quite alive to the Courts being astute to meet and cope with what has been described as the ever increasing ingenuity of many of those who manage election contests, but, to use the language of that eminent Judge, the late Mr. Justice Willes, no amount of evidence ought to induce a judicial tribunal to act upon mere suspicion or to imagine the existence of evidence which might have been given, but which the party interested has not thought proper to produce, and to act upon that supposed evidence and not upon that which really has been brought forward.

The function of the association referred to in this case seems to have been confined to asking for the selection of delegates for each polling subdivision—in each township two or three in number—who meet on the call of the president and secretary-treasurer, by advertisement, and select a candidate, and there, so far as appears by the evidence, their duties end. There is no evidence of their meeting subsequently, or taking any part as a body in the promotion of the election of the candidate so selected. It is not shewn that Luton was a member of the association, and he was not a delegate to the convention.

Upon Mr. Brower being nominated he was called in and made a brief speech accepting the nomination as it was unanimous, and adding that he would do all in his power to be elected, and with their help was confident of victory. Luton was not a delegate, as I have said, and was not present when this speech was made. Subsequently, on the same day, a public meeting was held at which the candidate again spoke ; Luton was present part of the time, but not when the specch was made. It is unnecessary, therefore, to consider how far, if this association had been shewn to be one for the promotion of the election and

not simply for the selection of the candidate, it could be regarded, as has been sometimes contended, as in the nature of a partnership, so as to make the individual members of the association, as well as the association, agents of the candidate.

The learned Judges have found as a fact that there was no evidence that the association had taken any part in the work of the election, and for any purpose of that kind it was not in existence. I should have come to the same conclusion, but I think, if I differed, the rule laid down both here and in the Supreme Court should be adhered to, that we should decline to interfere with their decision unless manifestly erroneous.

There is this broad distinction between the *Haldimand Case*, 1 Elec. Cas. 572, and this, that in the former the association actively interfered in the promotion of the election, and the trial Judge so found, and, although some of the Judges in the Supreme Court doubted as to the sufficiency of the evidence of agency, they declined to interfere with the Judge's finding; in the present case, on the contrary, the Judges find as a fact that the association's duties ended in the selection of a candidate, and I for one am not prepared to overrule them upon that question of fact.

The association's participation in the promotion of the candidate's election being eliminated, the question of agency has to be decided on the ordinary rules affecting election cases, and, as I understand them, there must be either express authority from the candidate himself or some authorized agent, or at least knowledge on the part of the candidate of the part which the person acting is taking in the election, or there must be circumstances proved from which the authority of such person may be implied.

It is not pretended that there was any express authority, and the circumstances relied on from which it is sought to

imply agency on Luton's part, as found by the learned Judges, are:

1. That he was present at three meetings of electors when the voters' list was gone over, even if no other work was done.

2. That he acted as chairman of a public meeting called in Brower's interest.

3. That he canvassed some voters.

4. That from his antecedents the candidate hoped or believed or expected that he would be an active supporter.

I think it would be to take an exaggerated view of the facts to treat these meetings at the private houses of some of the electors as committee meetings, in the ordinary sense of the term, authorized or intrusted by the candidate with the work of the election, but the finding of the learned Judges, fully borne out by the evidence, that he was not shewn to have taken any part in anything done at those meetings, or been intrusted with any work to be done in the promotion of the election, repels any such implications. But I agree with the findings of the learned Judges that such meetings were not of the character of committee meetings, and the people so congregated were not, either as a body or individually, the agents of the candidate.

Luton was known to be a Conservative, and as a voter was perfectly entitled to take the chair at a public meeting and to canvass voters, even though he had done so to a much larger extent than he is shewn to have done, without becoming an agent of the candidate. I think he was a volunteer, quite entitled to take a much more active part than he is shewn to have done without exposing the candidate to any risk of his being liable for acts done by him as his agent.

As to Taylor, whenever it is found that the function of the association was confined to the selection of a candidate, the fact of his being a vice-president or chairman ceases,

in my mind, to be of any importance; he was not a delegate, nor was he present at the convention.

He was a member of a club organized for the purpose of aiding the candidate, but a club of which the candidate had no knowledge.

I entirely agree with the observation of a learned Judge, that the evidence of agency ought to be very strong, clear, and conclusive before a Judge allows himself to fix a candidate with such a responsibility for corrupt practices.

The acts of both these persons are acts which any ardent supporter of the candidate might well have done as a voter without exposing the candidate to the risk of being made responsible for his acts as an agent, and I am not prepared to reverse the conclusion at which the Judges have arrived.

I think, therefore, the appeal should be dismissed.

I may add that I agree with the other members of the Court that the respondent is not, under the circumstances, entitled to the benefit of the saving clause.

BOYD, C.:—

The evidence shews that there is an organization of the Conservative party in East Elgin to promote the success of the party politically in the Province and in the Dominion—one and the same organization for both purposes. Usually there is an annual meeting held by the members at which officers are elected: a president, a vice-president, and a secretary-treasurer for the whole riding, and vice-presidents for each municipality, also known as "chairmen of districts." This association becomes active when an election is impending, and its chief function is to bring together a convention of delegates from each polling sub-division. This convention is summoned upon call of the president and secretary-treasurer by means of public advertisement through the newspapers. There is also a

communication sent to the central chairman for the township—*i.e.*, the vice-president of the district—that he shall notify the chairman of each polling subdivision asking that delegates be sent to the convention. Each polling subdivision is entitled to send three delegates to the convention, and the chief function of the convention when assembled is to choose a candidate to contest the riding in the interests of the Conservative party.

That course was pursued in the Provincial election of 1898. The convention met in the Town Hall, Aylmer, on the 27th October, 1897, pursuant to advertisement, and the delegates then assembled unanimously chose Mr. Brower, the respondent, to be the candidate of the party. The meeting, called for one o'clock, was gradually enlarged during the afternoon into a further meeting where some 300 or 400 were present, but of these it is said by Mr. Miller (Brower's financial agent), that the delegates all told would be about 87 in number.

Mr. Brower says that he came there with no intention of running, but when the convention was unanimous he said he would accept the call. He made the usual speech of acceptance, thanking the meeting and hoping that he would have their support.

The active work of the campaign began about the 1st February, 1898 — a month before the day of election, which was the 1st March. Mr. Brower came on the field and began a personal canvass for a short time, then he was taken ill, confined to the house for two weeks, and was out again a little before the voting. He also made use of the instrumentality of public meetings, the dates of which were chiefly arranged by him and Mr. Miller.

Other agencies also became active; of which there is evidence of two not very dissimilar kinds. At Aylmer the Liberal-Conservative Club recommenced its meetings four or five weeks before the polling day. This same club

had been in existence and operation during former elections, but between times it had "dropped out" (as Mr. Miller expresses it).

And at the township of Yarmouth, where Mr. Brower lives, and in polling sub-division No. 7, there was a series of meetings at the houses of the most active Conservative workers in that locality, who occupied themselves more or less with voters' lists relative to the approaching election.

Mr. Brower had been member before on several occasions when the same methods were in vogue, and must be credited with reasonable knowledge of the general machinery of the electoral campaign. Mr. Miller was also secretary-treasurer of the Conservative Association for East Elgin, and he tells us that the vice-presidents or chairmen of districts elected by the association are supposed to be the head men of the party in their respective localities, and are supposed to look after the local organization in the local elections. For the Yarmouth township W. H. Elliott was the central or local chairman appointed by the association, and for Port Stanley Alexander Taylor occupied the same position. Mr. Brower admits that he knew Elliott was the chairman of the subdivision where he and the respondent lived, but does not recollect that he knew Taylor to be the chairman of the Port Stanley district. It is to be noted that Mr. Brower had at the time of the convention a very accurate knowledge of the names of the chairmen of eight of the polling subdivisions in Yarmouth. Mr. Elliott, who was the central chairman for that township, did not know these, but then procured a list of the names from Mr. Brower.

The nature and methods of the association which brings the candidate into the field become intelligible from the evidence, though great pains is taken to conceal all traces of membership.

Not so clear, however, is the method of working in the actual campaign. That is left somewhat in obscurity, but

certain strong inferences result from the facts stated. Though the chief function of the Conservative association is to bring a suitable candidate into the field, yet parts of the organization remain active thereafter, that is to say, the sub-officers appointed by the organization for the whole riding or county, and styled "chairmen of the districts," are charged with the duty of managing matters within the lesser municipal or electoral subdivisions of the locality so as to promote the success of the party candidate. At the time of nomination there existed a chairman of the whole township, and also chairmen of the various polling subdivisions, and the examination of voters' lists and other work of local interest was left in the hands of these prominent men. Each locality looked after its own local organization, and active workers could easily combine their efforts in such informal meetings as did exist in this instance. There is evidence of concert and pre-arrangement and method in the three meetings at which some dozen of the leading local Conservative workers took regular part, of whom W. F. Luton was one. These did the work of committee meetings as usually understood, and they were regarded and spoken of as such by some taking part in them. The three meetings were held at the houses of A. A. Luton, Padden, and W. F. Luton (cousin of the other). Padden and A. A. Luton were both delegates to the convention which nominated Mr. Brower, and they were of those whom he invited and upon whom he relied to promote his return.

Mr. Elliott, the central chairman for Yarmouth, was a regular attender at these meetings, and he certainly was a right hand man of the respondent during this election. There is thus, to my mind, established privity between the respondent and W. F. Luton, by means of his co-operating with these agents of the defendant in committee work. Mr. Elliott tells what was done at these meetings: "I think we made arrangements who should see particular

people, assigning to one man the duty of seeing so-and-so." He says again there was no formal appointment of committees, but they would meet somewhere to do the work. "I attended three such informal meetings." They also went over the voters' lists as part of the business. George Cline says that he was appointed at one of these meetings to go and see one or two voters, or he agreed to go. Again, the conduct of W. F. Luton with respect to the public meetings, on which the respondent confessedly relied to assist his election, is noteworthy. It is proved (against Mr. Luton's failure to recollect) that at one of the opponent's public meetings he called out to those present that Mr. Brower would have a meeting on Saturday evening and he wanted the crowd (about 100) to attend. At the Brower meeting Mr. Elliott was appointed chairman (probably because he was officially so), but he desired Mr. Luton to act in his stead, in consequence of which he was proposed and took the chair.

Luton also interviewed voters before the polling day, and took others to the poll on that day—all acts tending to shew agency; but the most emphatic is his conduct at the informal committee meetings by which the substantial work of the contest was done in that locality. Luton was a man of importance, well-to-do, and for many years reeve. He did not hesitate to expend money on his side, and he has not, to my mind, successfully cleared up the unguarded statements of which Purlee speaks. If an agent of the candidate, as I think he is proved to be, he cannot be regarded as a subordinate one. There was a narrow majority upon a large vote polled; and, having regard to the other acts proved in the nature of illegal and corrupt practices, I do not think that the election can be upheld by the saving clause of the statute.

I also think that Taylor should be regarded as Mr. Brower's agent. It is nothing to the purpose that Mr. Brower says in his last evidence that he does not recollect

that he knew Taylor to be chairman of the Port Stanley district. As a fact, Alexander Taylor was appointed to be the vice-president of that municipality. So that he had the right to control and direct the local organization there according to the well understood method of working. We find him as an active and contributing member of the Conservative Club at Port Stanley which was brought into activity for the election. He attended two meetings when the voters' lists for the whole village were gone over. The active Conservatives of the village attended for the purpose, as Taylor says, "of working out Mr. Brower's cause." There was no other committee in the place than this club.

Taylor also, being chairman of the district, took the chair at the one meeting Mr. Brower held at Port Stanley and made remarks in the candidate's presence commending him to the people. He had met Mr. Brower the night before the meeting, and had a short talk with him about the election. The corrupt practice of this man, as found by the trial Judges, affects the candidate because of his imputed agency.

Mr. Brower's professed ignorance of any organization to support him cannot weigh against the circumstances of the case. Technically and formally, perhaps, there was no organization, but there was a quiet and effective method of working by which his return was accomplished by the party whose candidate he was. He cannot accept the nomination of the association, and also claim the benefit of the tactics pursued by party methods, without becoming involved in the responsibility attaching to any unfair or illegal acts done by the active workers to whom was committed the conduct of the election. In the more modern and American way of electioneering, the candidate almost disappears as an active agent, and is superseded by occult party machinery adapted to evade the decision of the Courts, and seeking to render detection of wrong-doing

difficult, if not impossible. The Court must also move: and, as was said in the *Haldimand Case*, 1 Elec. Cas. at p. 578, by Mr. Justice Falconbridge, and approved by the present Chief Justice of the Supreme Court, "be astute to meet and cope with the ever increasing ingenuity of some of those who manage election contests."

For these reasons, shortly given, I think the election should be vacated, and costs should go to the appellant.

MACLENNAN, J.A.:—

This is an appeal from the judgment of Osler and MacMahon, JJ., dismissing a petition to set aside the election of the respondent Brower as a member of the Legislature of Ontario.

The learned Judges found two corrupt acts to have been committed by one William F. Luton, and one corrupt act by each of three other persons named Ferguson, Taylor, and Day; but they determined that none of those persons was proved to have been an agent for whose acts the respondent was answerable, and that the validity of the election was not affected thereby.

It was contended very strenuously before us on behalf of the respondent that the corrupt acts alleged to have been committed by Luton were not sufficiently established by evidence; but I am of opinion that the judgment in that respect is fully warranted by the evidence and ought not to be disturbed.

The finding of the corrupt practices on the part of Ferguson, Taylor, and Day was also challenged by the respondent's counsel. The charges against those persons were a violation of sec. 164 (2) of the Election Act by providing money to be used by one Rudolph Long in betting or wagering upon the result of the election. The evidence was, that, while the contest was going on, Long came into a shop where these three persons happened to be, and said he had been challenged by a supporter of the

Liberal candidate to bet upon the result, and wanted some money wherewith to accept the challenge, whereupon each of the three persons named gave him a sum of money—ten dollars each—for that purpose. No bets, however, were ultimately made, and the money was returned a few days afterwards. It was contended that, inasmuch as no bets were actually made, and as it did not appear whether the bets were to be Long's bets or those of the three persons advancing the money, the transaction was not within the section. The learned Judges have held, and I think rightly, that the mere providing of money to be used by another in betting on the election constitutes the offence intended by the Legislature, whether a bet has afterwards been made or not. I think the judgment of my brother Osler makes it clear that such is the proper construction of the Act.

The corrupt practices having been established, the further question is the agency of the several parties who committed them. Agreeing as I do with the very full judgment of my brother Osler, I might content myself with adopting it; but I shall state briefly how the matter has presented itself to my own mind on a careful perusal and consideration of the evidence.

First, with regard to the agency of Luton. The authorities with which we are so familiar, and which have been so often quoted, establish that agency must be authorized, either expressly or by implication, either by the candidate himself or by some other person first authorized by him. There is here no evidence of personal authorization, either express or implied. The respondent and Luton were personally well acquainted. They both resided in the same township (Yarmouth), of which Luton had once been a councillor. Brower had represented the constituency during the previous term of the Legislature, and Luton had been an active supporter of his during that election. Luton was a strong Conservative, and Brower

hoped or expected or believed that he would support him actively on this occasion. There had, however, been no request from Brower or any one on his behalf for Luton's support. They met only once during the contest, when nothing of consequence passed between them, and Brower had no knowledge of what, if any, part Luton was taking. Upon these facts, I think it is clear that there was no authority, either express or implied, given by the respondent personally to Luton which would constitute agency. Luton was himself a person entitled to vote, and therefore entitled to take an active part in the election without request or authority from any one; and no inference of agency can be drawn from the mere fact of activity, no matter how great, either in the former election or in the one in question. This right of his as an elector is therefore quite sufficient to account for his presence at the three meetings in his own polling subdivision, including the one at his own house, and also for his presence at and presiding over one of the respondent's meetings, and for the fact that he canvassed a few voters. There is no presumption whatever that he did these things as agent for the respondent.

It is, however, contended that Luton was a member of a Conservative association for the riding, that the election was, with the consent and approval of the respondent, managed and conducted by that association, whereby its members, including Luton, became his agents, and for all whose acts he is responsible. After reading and considering the evidence respecting this association, I agree with my learned brother Osler as to its vague, shadowy character. There was no election or fee requisite to constitute membership, and any person residing within the constituency, calling himself a Conservative, might consider himself a member. There seem to have been a president and secretary, and a chairman for each municipality in the riding, but how or by whom they were elected does not appear. The only function which we find this associa-

tion to have performed is the selection of candidates for Parliament and the Legislature. That was done by a convention, called by the president, of one, two, or three delegates from each polling sub-division. The respondent was selected as the candidate of the Conservative party at such a convention, held about four months before the election. It is said that A. A. Luton and one Padden were delegates from the township of Yarmouth, but how they were chosen or by whom nominated does not appear. It is said there was no meeting for that purpose in the sub-division. W. F. Luton was not a delegate, and I do not find that there is any evidence that he was even a member of the association. Even if being a Conservative voter was sufficient qualification for membership, it still required his consent to become one. It seems that after the respondent was nominated, the convention became merged into a public meeting, which had been called for the same day. Luton was present at this meeting for some part of the time, but not during a speech made by the respondent. It does not appear whether this was a public meeting of ll voters who chose to attend, or of the members of the association; but, which ever it was, we hear no more of the association or its members, or of any act afterwards done by either in furthering or promoting the election. For anything that appears, when the convention had selected its candidate, its functions came to an end, and the association was heard of no more. That being so, I think it is impossible to say that Luton became and was an agent by reason of membership in, or any other connection with, the association, and I think my learned brothers were right in holding that no agency for the respondent was established on the part of W. F. Luton.

It was not contended that there was any evidence of agency on the part of Ferguson or Day, but it was urged that Alexander Taylor was an agent, by reason of his being an officer of the association as a vice-president or chairman.

The same reasoning which I have used in Luton's case applies in great part to that of Taylor. The association did not profess to assist the respondent in his canvass, and Taylor was neither a delegate to, nor present at, the nominating convention. A club or committee seems to have been formed at Port Stanley, where he lived, for the purpose of promoting the election, of which he was a member; but it was not shewn that the respondent was aware of the existence of the club, or that he in any way relied upon its action. There is one piece of evidence tending to establish agency, but which I think is not in itself sufficient. It is what occurred at a meeting held by the respondent at Port Stanley, and addressed by him. Mr. Taylor was present at that meeting, and presided over it as chairman. He admits having made a little speech to the meeting introducing and commending the respondent to the people. He had met the respondent in the street before the meeting, and shaken hands with him, and asked him how things were going. That is all. I think it would not do to hold that to be sufficient evidence of agency. In the *North Victoria Case* (1875), H. E. C. 671, it was held by Wilson, J., and affirmed by this Court, that the mere presiding at a meeting, and a good deal more, was not sufficient to establish agency.

I am therefore of opinion that the appeal should be dismissed.

Finding that three members of the Court have come to a different conclusion on the question of agency, it has become necessary to consider the effect of the saving clause, sec. 172. Having examined the decisions on that section, I am constrained to come to the conclusion that it is inapplicable in this case, and that the election must be set aside with costs.

Moss, J.A.:—

The respondent has not seriously disputed that for a number of years before and at the time of the election of

1897 there was in active existence an organization known as the East Elgin Conservative Association.

In times when no elections were pending it evidenced its existence by an annual meeting for the election of officers, at which there were elected a president and a secretary-treasurer for the whole riding or electoral division, and to these was confided the general management of its affairs. There were also vice-presidents elected, one in and for each municipality in the riding; and the president, vice-presidents, and secretary-treasurer thus elected were the central board or executive of the association.

When necessary, meetings of the association assembled upon the call of the president and secretary-treasurer. There was no membership fee, and such funds as were received by the secretary-treasurer were derived from collections made either at the meetings or at other times when a process described in the evidence as "passing round the hat" was resorted to.

One of the principal objects of the association was seeing that in election times a candidate representing the political views of the Conservative party was brought forward, and promoting and securing his return as the member to represent the riding.

With this object in view a convention of delegates from each polling subdivision was summoned. The vice-presidents of the districts, acting upon the direction of the central authorities, notified the chairmen of the polling subdivisions to appoint delegates.

Notice of the time and place of the meeting of the convention of delegates was given by public advertisement stating the object and purpose for which the convention was called. It was well known and understood that the person to be chosen by the convention was to be the party candidate and was expected to receive the support not only of the nominating delegates but of the association as a body.

In the case of the election in question this was the course pursued. In the latter part of the year 1897 it was known or believed that in the year 1898 a general election for the Legislature of the Province would be held, and it seems to have been considered desirable to place in the field a Conservative candidate without waiting until the formal announcement of the issue of the writs. A convention of delegates, appointed and summoned pursuant to notification in the usual fashion, was held at Aylmer on the 27th October, 1897.

To this assemblage the respondent, Mr. Brower, did not offer himself as a candidate, nor had he before the meeting offered himself as a candidate to the electors of the riding. He appears to have had no intention of offering himself as a candidate or of contesting the riding, unless it happened that the convention choose him as its nominee. He was made the choice of the convention, and because of that he accepted the call and became the candidate. In his speech of acceptance he expressed the hope that he would receive the support of the meeting, and it is not unfair to infer that he received assurances to that effect that were quite satisfactory to him.

After the nomination and acceptance there was a still larger gathering and further addresses in Mr. Brower's interest, including another address from himself.

The association having in this way chosen and put forward its candidate, nothing more remained to be done for a season or until the announcement of the issue of the writs, but it did not, as I think, separate to remain quiescent until occasion arose for the nomination and putting in the field of another candidate for another election. There yet remained the promotion at the proper time of the return of its candidate, Mr. Brower, as the member to represent the riding in the Legislature of Ontario.

When the time arrived the central authorities again became active. The vice-presidents of the districts were

notified and required to communicate with the chairmen of the polling subdivisions and to get them to work. The whole organization throughout all its ramifications and agencies was stirred up and put to work upon the business of securing the candidate's return.

In all this there was nothing improper. It was but a fulfilment of the assurances—which Mr. Brower had a right to expect would be fulfilled—of the association's support of his candidature.

But it all points to this, that where there is found an association with objects, aims, and purposes such as these —with its chosen candidate in the field, a candidate not self-proposed or seeking the suffrages of his fellow electors of his own motion, but only because he has been chosen and is being backed by the association—it is not unfair to say that acts done by the association or its known officers, or by persons authorized by them, in the course of the election, should be held to affect the candidate as acts done by his agents, though without his actual knowledge.

Where a candidate places himself unreservedly in the hands of an organized body of his fellow electors, accepts their nomination, pledges himself to them, asks for and receives the assurance of their support, and in reliance upon them takes the field, he ought not to be permitted to shelter himself from the consequences of acts done or authorized by that organization on the ground that he did not know that the person whose acts are in question was acting or assuming to act in his interest.

It then becomes a question upon the evidence in any given case whether the person whose acts are impeached was a member of the association, or was working under or at the request of the association or any of its known officers, in the course of the election. If so, that the candidate personally gave no authority ought not to be anything to the purpose.

Applying these views to the cases before us on this

appeal, I have come to the conclusion that the evidence fails to connect W. F. Luton with the association or its officers in such manner as to affect the respondent by his acts or to render his acts liable to be deemed acts done by an agent without the respondent's actual knowledge.

It cannot be denied that the modest reluctance to exhibit their good deeds to the world shewn by some of the witnesses put great difficulty in the petitioner's way of establishing agency. But, making all fair allowance for that, there still remains positive testimony, which has been accepted as truthful by the learned trial Judges, to the effect that Luton was not given any work to do in the election, and that he undertook no part in it at the request or by the direction of the association or any of its officers.

The evidence is, that the committee meetings (so called) were not called by Mr. Elliott, the vice-president of the district, or by any other known officer of the association; that Luton was not invited or requested to be present by Mr. Elliott or any known officer; that, though present, Luton took no part in anything that was being done; he was not referred to or requested to take part or to undertake to look after any persons on the voters' list or to give or gain information about any such persons.

Upon the evidence it would appear that for some reason or other he held aloof, or was held aloof, from participation in whatever election work was done at these meetings. Even at his own house he was merely an onlooker as regards the election work, and devoted himself chiefly to the entertainment of his guests' wives.

The testimony and the findings do not leave it open to us to draw inferences to the contrary of the conclusions reached by the trial Judges. These matters have been positively stated in the testimony and the statements have been accepted as true.

And while we cannot avoid doubts in regard to the testimony of a person who, while disclaiming any special

interest in the candidate or the result of the election, is found willing to pay $5 to a man to take care of his house so that he may be enabled to give his whole day to the election, while the recipient, who happens to be a voter in the opposite interest, is kept away from recording his vote, as well as to disburse other sums for illegal purposes, we cannot, in face of the trial Judges' findings, reject the testimony.

W. F. Luton was not himself an officer of the association or a delegate to the convention, and he is not upon the accepted testimony connected with the doings of the association or its officers in the course of the election.

Such canvassing as he did, and the conveying of voters to the poll (which appears to have included giving a lift to a voter on the opposite side), are found to have been done of his own motion, and the act of taking the chair at a public meeting, at which the respondent was not present was a formal thing without any pre-concert.

But as regards Taylor I am, with much deference, of the opinion that for his acts in the course of the election the respondent ought to be answerable.

That the latter did not know or was unable to recollect that Taylor was vice-president of the Port Stanley district is of little importance. It would be an insult to his intelligence to suppose that he was not aware of the organization of the association under whose auspices he came forward as a candidate, That he knew there was a vice-president of the Port Stanley district, whoever the individual might be, is more than likely. He cannot have been unaware that in every district, beginning with that in which the nomination meeting had been held, there was the same method of carrying on the affairs and work of the association as in the district in which he resided. He was present at the public meeting at Port Stanley held in the interest of his election, over which Taylor presided as chairman as of right by virtue of his position as vice-president of the district.

The evidence shews Taylor to have been one of the active supporters of the respondent, contributing time, energy, and money towards his election. Taylor was an officer of and a prominent worker in the association, and I agree with the learned Chancellor in thinking that the respondent cannot accept the nomination of the association, and also claim the benefit of the tactics pursued by party methods, without becoming involved in the responsibility attaching to any unfair or illegal acts done by the active workers to whom was committed the conduct of the election.

I agree with the learned Chancellor in holding the respondent affected by Taylor's acts, though, in view of the trial Judges' findings, I have not been able to come to the same conclusion upon the evidence with regard to Luton.

Taylor having committed a corrupt act, the election is *primâ facie* avoided, and it thus becomes a question whether the respondent is entitled to the benefit of sec. 172.

Of this section it has been judicially remarked that every Judge who has had occasion to consider it has found it an embarrassing one.

It has also been said by high authority that its curative provisions should be applied with great caution, the onus being upon the respondent to convince the Court that the result of the election cannot have been affected or cannot reasonably have been supposed to have been affected by the corrupt and illegal practices at the election shewn in the evidence and reported upon by the trial Judges.

If Taylor's act was the single act proven—if it stood alone—it might be safe to say that it ought not to avoid the election, for, though I am far from thinking that the act of providing money to be used by another in betting upon the result of the election is a venial act, or one that should be considered trifling in its nature, yet, as it happened, Taylor's act in this instance taken alone could not be said to have affected the result.

But under sec. 172 Taylor's act is not to be taken alone. It must be taken in connection with the other illegal practices which have been shewn.

The trial Judges have reported several instances of corrupt practices. They have reported one person guilty of an act of undue influence, three of being concerned in acts of bribery, and Taylor and two others of being concerned in providing money to be used in betting on the result of the election, all of them grave offences against the law.

The total vote polled was over 4500, and the majority was 29.

The acts of bribery were committed by W. F. Luton, and, according to the evidence and the findings of the trial Judges, were conducted under circumstances shewing premeditation, deliberation, and secrecy. It is by no means clear that he was not willing to spend further sums in similar ways in order to aid the respondent's election, and the evidence does not remove the impression that the reported acts were not the only cases of the kind in which Luton was concerned.

I repeat what has been said in other cases, that in considering whether a corrupt act or acts is or are trifling in their nature or extent the Court will bear in mind that bribery has always been deemed to be the head and front of election offences, that its influence is by no means limited to the individual bribed, and that its powers are in the highest degree Protean and difficult to trace.

In view of the corrupt and illegal practices shewn in this case, I am unable to say that the section can be properly applied to save the election.

I therefore agree that it should be avoided with costs.

LISTER, J.A.:—

I think that Taylor was, within the meaning of the decisions, an agent of the respondent. He was a member

of the Conservative Association, and his duty was to advance the interests of the candidate of that association in his district. The respondent, therefore, is affected by his acts. An illegal act by Taylor having been proved, all the other proved illegal acts, though not committed by the respondent's agents, must be taken into consideration in applying the saving clause. Having regard to the acts proved, it is, in my opinion, impossible to apply the saving clause in this case, and the election must be set aside.

E. B. B.

SOUTH PERTH (1899).

PROVINCIAL ELECTION.

BEFORE STREET AND MEREDITH, JJ.

STRATFORD, *June 29 and 30, 1899.*

LINDSAY ELLAH, *Petitioner,*

v.

NELSON MONTEITH, *Respondent.*

Corrupt practice—Intoxicating liquor at card party—Payment by subscription—German custom—Voters' lists—Finality—Issue of writ for bye-election—Power of Legislative Assembly.

A number of voters met at a voter's house for the purpose of going over the voters' lists and then of having a card party. After the lists were disposed of the card party took place, and meat and drink were supplied by the host, but the drink, a quarter cask of beer, was paid for by subscription, according to the custom of the locality, which was a German settlement :—

Held, not a corrupt practice within the meaning of sec. 161 of the Elections Act, R.S.O. 1897, ch. 9.

Held, also, that no enquiry could be made on a scrutiny as to voters being under the age of twenty-one as the voters' lists were final and conclusive on that point :—

Held, also, that the Legislative Assembly has power while in session to order the issue of a writ to hold a bye-election, sec. 33 of R.S.O. 1897, applying only to vacancies occurring while the Assembly is not in session.

THE petition set out that the election was held on the 21st and 28th days of February, 1899, and contained the usual charges of corrupt practices, as well as charges that the writ for the election was issued while the Legislative Assembly was in session, and that the issue of such writ during such session was illegal, and all proceedings taken under it were void.

Riddell, Q.C., for the petitioner.

Aylesworth, Q.C., for the respondent.

STREET, J. :—

In my opinion the objection taken by the petitioner to the validity of the writ of election cannot be sustained. The objection, as I understand it, is that statutory authority is required for the issue of a writ to hold a bye-election, and that there was none in existence authorizing the issue of a writ by the Speaker of the House during the session; in fact, that the issue of such a writ during the session by the Speaker is contrary to sec. 33 of ch. 12 R.S.O. 1897.

In the present case it appears that the writ was issued upon a resolution of the House directing its issue. It is not necessary to consider whether the House has any inherent right to act in this way because it has a clear statutory power to do so.

The old Controverted Elections Act ch. 7 of the consolidated statutes of Canada remained in force certainly down to and after confederation (see 36 Vict. ch. 28, sec. 56 (D.)), and by sec. 94 "the House" is empowered and required to give the necessary directions for issuing a writ for a new election where the return of a member has been set aside upon an election petition. "The House" here referred to was the Legislative Assembly of the Province of Canada as it then existed.

By sec. 84 of the B.N.A. Act it is provided that until the Legislature of Ontario otherwise provides all laws existing at the time of the union in that Province with regard *inter alia* to the issuing of new writs in case of seats vacated otherwise than by dissolution shall apply to elections of members to serve in that Legislature.

Sec. 61 of ch. 11 R.S.O. 1897, provides that the Legislative Assembly upon being informed of the setting aside upon petition of the return of a member of the House shall forthwith give the necessary directions for issuing a writ for a new election.

Sec. 33 of ch. 12 R.S.O. 1897, is the section upon which the petitioner here relies. It provides that "no writ shall issue under any of the provisions of the next preceding seven sections during a session of the Legislative Assembly." When the seven sections here referred to are examined it is apparent that what is intended by them is merely to afford a machinery for the issue of writs for new elections in the cases where vacancies happen whilst the House is not sitting; and that they are not at all in conflict with the statutory or other powers of the house when it is in session to direct the issue of writs for the holding of bye-elections.

At the trial of this petition at Stratford after full argument we expressed our views as to the other matters raised by it upon which evidence was offered, as well as upon the matters of law and fact discussed before us. In accordance with those views we determine now that the respondent was duly elected at the election referred to: that no corrupt practice has been proved to have been committed by or with the knowledge and assent of any candidate at the election: that John O'Brien was proved at the trial to have been guilty of a corrupt practice at the said election: and that we have no reason to believe that corrupt practices have extensively prevailed at the said election.

The petitioner must be ordered to pay the costs, and the petition must be dismissed.

MEREDITH, J. :—

Mr. Riddell endeavoured to support the petition upon three grounds, namely :—

1. That the election was entirely void, having been held, as he contended, in violation of the provisions of sec. 33 of ch. 12 R.S.O. 1897 ;

2. But if not, that the candidate Moscrip was entitled to the seat on a scrutiny of the votes ;

3. And that in any event the election should be avoided because of corrupt practices by the respondent's agents without his knowledge.

There was no contention at the trial that the respondent should be disqualified.

The charges of corrupt practices were all dismissed during the trial. Indeed, there was no very serious contention that any of them, except that numbered 62 in the particulars, could be supported.

The facts of that case were that a number of voters met at a voter's house, most of them for the double purpose of going over the voter's list in the respondent's interest, and of afterwards having a card party ; all of them attending for the latter purpose. After the business connected with the election was over the whole party continued in the pleasures of a card party until two o'clock in the following morning ; and during the latter time meat and drink were supplied to all by the master and mistress of the house ; but the drink was afterwards paid for according to custom in the locality by subscription, each person being supposed to pay a fair proportion of the cost of the drink, which was a quarter cask of beer. This took place in what is known as a German settlement, the voters were Germans or of German extraction, and what was done was said to be entirely in accordance with German customs there.

We held that this was not a corrupt practice within the meaning of sec. 161 of the Elections Act (1) because, substantially, each person paid for his own drink, and the food was supplied by the master of the house in his usual place of residence; and (2) it was not supplied at any meeting of electors. There was no doubt, whatever, that these persons met for the two separate and quite disconnected purposes, and that the business part of the evening was entirely over and the solely "social" part was going on when the drink was obtained. There was nothing whatever to arouse even a suspicion that the double purpose of the meeting was a scheme to evade the enactment in question. The master of the house had been newly married, and all the testimony, and the evidence of the surrounding circumstances, pointed to the good faith of the persons concerned and to the truth of the conclusion in fact we reached.

And I may now add that had a corrupt practice been shewn there was not sufficient, if any, evidence of agency to connect it with the respondent. It was not Christian Rock but his brother who was the supposed politician; and the brother had no part in providing the drink except in so far as he paid for his own share.

With every degree of watchfulness against every sort of evasion of this enactment I am still of opinion that no case whatever has been made out upon this charge.

In regard to the scrutiny, we held that it was not open to the petitioner to shew or endeavour to shew that some of the voters whose votes are objected to and sought to be struck off were under age at the time of the polling; that the voters' list was final and conclusive on that question upon a scrutiny.

What the plaintiff desired to do was, upon a scrutiny under sec. 76 of the Controverted Elections Act, R.S.O. 1897, c. 11, to enter upon an enquiry as to the ages of some of the voters, with a view to having their votes

struck off, upon such scrutiny, if it were shewn that they were not of the full age of twenty-one at the time of voting. But that is in the teeth of sec. 24 of the Voters' Lists Act, R.S.O. 1897, ch. 7, an enactment passed for the very purpose of preventing such enquiries owing to the great delay and cost which they occasioned.

It was contended that secs. 8 and 9 of the Elections Act, R.S.O. 1897, ch. 9, conflicted with the other enactment and displaced it. But we are to give effect to both if possible; and I perceive no difficulty in doing so. A person not of the full age of twenty-one years is not entitled to vote, but the proper time to have the question of his age and right to vote in that respect determined is upon the revision of the voters' list; if it is not done then it cannot be done afterwards upon a scrutiny.

The purpose of the legislation was to give an opportunity in a cheap and speedy manner to have all such questions as are not excepted out of sec. 24 finally and conclusively determined, and to prevent just what was sought to be done here, reopen such questions and have them retried and again adjudicated upon at great delay and expense.

In view of our ruling upon this question, but without submitting finally to it, Mr. Riddell abandoned the other questions which were open to him upon the scrutiny, saying that he could not hope to succeed upon this branch of the case without having the votes of those he hoped to be able to shew were under age when they voted, struck off.

The other ground taken by Mr. Riddell seems to me also to lack any substantial foundation.

It is rested upon secs. 28 and 33 of the Act respecting the Legislative Assembly, R.S.O. 1897, ch. 12, and the supposition that there is no other lawful way in which, in such a case as this, a new writ for an election could have been issued; the supposition is a fallacy.

It entirely disregards sec. 61 of the Controverted Elections Act, which expressly gives the power exercised in this case by the Legislative Assembly.

It is very plain to me that the sections relied upon by Mr. Riddell and the others of a like character in the same Act were enacted to prevent the delay of a re-election until the Legislative Assembly should be in session, to require the election of a member for the constituency forthwith after the seat became vacant; and in no manner whatever interfered with the power of the House when in session; a power which existed by statute—whether otherwise or not we need not stop to consider—before confederation and which was continued in the provinces until the legislation by the B.N.A. Act otherwise provided: see sec. 94 and C.S.C., ch. 7, sec. 94.

I would dismiss the petition upon all its branches with costs.

G. A. B.

EAST MIDDLESEX.

PROVINCIAL ELECTION.

BEFORE OSLER, J.A., IN CHAMBERS.

February 27th, and March 3rd, 1899.

Dismissal of Petition at Trial, Sheriff's Cost of Publication—Payment of Petitioner—Claim of Security Deposited.

Where an election petition is dismissed at the trial without costs, the petitioner must pay to the sheriff the costs incurred in the publication of the notice of trial thereof; and although the sum deposited as security is not security for such expenditure, payment out of Court will only be ordered on the condition of its being made good to the sheriff. No charge can be made by the sheriff for attending to the publication, no allowance therefor being authorized by the tariff.

THIS was a petition to the Court to decide as to the proper party to pay the costs of the Sheriff of publishing

the notice of trial of the petition to set aside the election, the petition having been dismissed without costs at the trial.

Aylesworth, Q.C., and *W. D. Macpherson*, for the petitioners.

The Sheriff in person.

OSLER, J.A. :—

A question is made as to who is the proper party to pay the Sheriff's costs of publishing the notice of trial in these cases in the electoral division, the petition having been dismissed without costs at the trial.

The petitioners contend that these expenses are part of the charges or expenses of providing a court and should be paid by the Crown.

The Sheriff states that the officer charged with examining his accounts has refused to allow his disbursements for publication, and urges that he ought to be paid by somebody.

The Act R.S.O. 1897, ch. 11, is the only authority for imposing charges upon moneys provided by the Legislative Assembly.

The only charges are those mentioned in sec. 521: Fees for witnesses who may be called and examined by the trial Judges ; and in sec. 117: "All expenses properly incurred by the Sheriff in attending on the Judges and providing a court."

I do not see how, by any stretch of interpretation, the cost of publishing notice of trial, which is required to be done by Rule of Court passed under the authority of secs. 41 and 112, can be treated as part of the expenses of "providing a court."

The deposit required to be made by the petitioner is security for all costs and expenses that may become payable by the petitioner to: (*a*) any person summoned

as a witness on his behalf (sec. 13), or (*b*) to the respondent (Rule 13, sec. 102).

Claims on the security shall be disposed of by order of a Judge.

All costs, charges, and expenses of, and incidental to, the presentation of a petition and to the proceedings consequent thereon (except such as are otherwise provided for), shall be defrayed by the parties to the petition in such manner and in such proportion as the Court or Judge may determine.

Under these sections I do not see how, under any circumstances, the cost of giving and publishing notice of trial can ever be considered as the respondent's costs when he succeeds, recoverable by him from the petitioner, and chargeable upon the deposit as part of his costs.

Sec. 46: The petitioner may be changed, if three months elapse after the day on which the petition was presented without a day for the trial having been fixed.

Sec. 41: Notice of the time and place of trial shall be given in the prescribed manner, which is by:

Rule 27: The time and place of each election petition shall be fixed by the Judges, and notice shall be given in writing by the Registrar by sticking up in his office, sending copy to each party and another to the Clerk of the Crown in Chancery, and another to the Sheriff. The Sheriff shall forthwith publish the same in the electoral division.

This publication, though not expressly so required as in the case of publication of the petition by the Returning Officer under sec. 12, has always been done by advertisement in a newspaper.

And any "postponement of the beginning of the trial," under Rule 34, has always been "made public" by the Sheriff in the same way, though not expressly required to be done in that way.

There is no rule which makes the cost of publication

of the notice of trial by the Sheriff payable by the petitioner as part of the costs of the cause as Rule 9 provides in the case of the publication of the petition by the Returning Officer.

Nevertheless, I think that the cost of publication of the notice of trial may properly be regarded as part of the "costs, charges and expenses incidental to the presentation of the petition and the proceedings consequent thereon" (sec. 102), which, if the petitioner succeeds, would be payable or might be ordered to be paid by the respondent.

The petitioner presents and has the conduct of the petition. He therefore expects to have it tried, and although the Court fixes the day and place of trial of the petition, it is set in motion by the action of the petitioner in presenting it, even if he never makes a formal application for that purpose, which he is indeed bound to do under penalty of having the conduct of the petition taken from him under sec. 46. The Court would not direct the notice to be given except upon the assumption —not necessary to be made in any of these cases, however, —that the petitioner was applying to have the day and place of trial fixed, and counsel appeared in fact for the petitioner at the time and place appointed by the notice. It is in every sense the petitioner's notice of trial though given by the officer of the Court. I think he is bound to pay the Sheriff, and that an order may be made upon him to do so. No doubt the sum deposited by him as security is not security for this expenditure by the Sheriff, but being in Court I think it would not be ordered to be paid out except upon the terms of making good to the Sheriff the cost he has incurred at the instance of the petitioner, as may properly be held to have been the case.

It was said in the argument of the matter that this would be a sufficient intimation of the Sheriff's right and that the parties would see that he was settled with accordingly.

I do not see that the tariff makes any allowance to the Sheriff for the trouble he incurs in attending to the publication of the notice. This is a hardship which ought to be rectified as these officials incur a great deal of trouble and annoyance for which they are very poorly compensated, or not compensated at all.

G. F. H.

RE VOTERS' LISTS OF ST. THOMAS.

ONTARIO VOTERS' LISTS ACT.

BEFORE THE COURT OF APPEAL.

Present:—SIR GEORGE BURTON, C.J.O., OSLER, MACLENNAN, MOSS, AND LISTER, JJ.A.

10th January, 1899.
24th January, 1899.

(SPECIAL CASE).

Voters' lists — Assessment made in previous year — Qualification arising subsequent to final revision of roll—Freeholders—Tenants.

Where the assessment for a city, on which the rate for the year 1898 was levied and the voters list based, was made in the previous year, the roll having been finally revised on the 2nd December, 1897, freeholders, who were such between that date, and the last day for the revision of the voters list, were, under sec. 86 of the Municipal Act, R.S.O. (1897) ch. 223, and sec. 14 (7) of the Ontario Voters List Act, R.S.O. (1897) ch. 7, held entitled to be placed on the list; and freeholders also who had parted with the property for which they were assessed, but had acquired other sufficient property, were held entitled to remain on the list; otherwise as regards tenants, under similar circumstances, the form of oath required to be made by them precluding them.

THIS was a case stated for the Court of Appeal for Ontario, pursuant to R.S.O. 1897, ch. 7, sec. 38.

The question was with reference to the revision of the Voters' List for the city of St. Thomas for the year 1898.

The municipal council of the city of St. Thomas in 1890 passed a by-law, under sec. 52 of ch. 193 of the Revised Statutes of Ontario, 1887, providing for the taking of the assessment of the said city between the 1st

day of July and the 30th day of September, and for the return by the assessor of his roll on the 1st day of October in each year, and for its final revision by the court of revision by the 15th day of November; and, in case of appeals therefrom, for the final return by the Judge of the County Court by the 31st day of December.

The council of each succeeding year, including the year 1898, adopted the assessment of the preceding year, as the assessment on which the rate of taxation for each succeeding year should be levied, and the Voters' List of each year since 1890 was based upon the assessment roll of the preceding year.

The date of the final revision and correction of the assessment roll, upon which the Voters' List then under revision was based, was certified to be the 2nd December, 1897, the assessment roll for the year 1898 not being yet finally revised and corrected.

The questions submitted were:

Have freeholders or tenants of real estate, whose ownership or tenancy, as the case might be, commenced after the said 2nd December, 1897, a right, due notice of complaint having been given, to be placed upon the Voters' List of the said city for the year 1898, then under revision? If so, when should such ownership or tenancy have, at the latest, commenced?

Should the Judge remove from the list any living person, whose ownership or tenancy ceased between 2nd December, 1897, and the last day for giving notice of complaint of errors in the Voters' List?

Allan M. Dymond for the Attorney-General.

No one contra.

The case was heard before the full Court.

MACLENNAN, J.A.:—

The assessment roll for St. Thomas was finally revised and corrected on the 2nd of December, 1897, under a by-

law passed in pursuance of sec. 52 of ch. 193 of the R.S.O. (1887). In December, 1898, the County Judge was engaged in the revision of the Voters' Lists, and the Court is asked to answer the questions submitted.

The cases of freeholders and tenants may be considered separately.

By sec. 86 of the Municipal Act R.S.O. 1897, ch. 223 and seven following sections, freeholders rated to a certain value upon the last revised assessment roll of the municipality, and who continue to be such at the date of the election, provided they are *named in the Voters' List*, are entitled to vote; and by sec. 14 (7) of The Voters' Lists Act, R.S.O. 1897 ch. 7, a person whose name is not on the assessment roll at all, but who after the assessment roll became returnable, and before the time for applying to correct the Voters' List has expired, has become qualified to vote, is authorized to apply to have his name entered on the list.

It follows from these sections that any freeholder, who became such at any time between the 2nd December, 1897, and the last day for applying to correct the list, and who is otherwise qualified, is entitled to be added to the list, and there is nothing in the oath prescribed by sections 112 to 117 to prevent him from voting.

The same sections are applicable to the case of tenants, except that tenants must have been residents within the municipality, for one month before the election. But with regard to tenants, there is a difficulty occasioned by the form of the oath prescribed to be taken by them by sec. 113, which requires the tenant to swear that he was such on the date of the return or final revision and correction of the assessment roll, on which the Voters' List is based. Although this part of the oath may perhaps have been an oversight by the Legislature, I think we cannot say it was not intended to make a distinction between tenants, and freeholders who became such after the revision of the

assessment roll. I am, therefore, of opinion that the first question must be answered favourably in the case of freeholders, but otherwise in the case of tenants.

The answer to the second question must also be answered differently in the case of freeholders and tenants. A freeholder may have parted with the property in respect of which his name was placed on the list by the clerk, but before the time for applying to correct the list may have acquired other sufficient freehold. In such a case I think that by force of sec. 14 (7) and sec. 16 of The Voters' Lists Act, the Judge has power to retain his name, and to make the necessary correction in other respects. It is otherwise with a tenant. If he has parted with his original tenancy, and has acquired another, he is helpless, for he is barred by the oath, which requires him to swear that he was, at the revision of the assessment roll, tenant of the property *in respect of which his name is entered on the list.* And even if the Judge should, under sec. 162 of The Voters' Lists Act, have inserted his new tenancy on the list, he could not swear that he possessed the new tenancy at the revision of the assessment roll. A tenant, therefore, who has parted with his original tenancy, must be removed from the list, on proper application being made for that purpose.

BURTON, C.J.O., OSLER, MOSS, and LISTER, JJ.A., concurred.

G. F. H.

HALTON.

PROVINCIAL ELECTION.

BEFORE FALCONBRIDGE, C.J., AND STREET, J

TORONTO, *September 14th, 1900.*
TORONTO, *November 12th, 1900.*

IN RE CROSS.

Provincial Elections — Corrupt Practices — Proceeding by Summons — Limitations—Several Charges—R.S.O. 1897, ch. 9, secs. 187-8, 195.

The limitation of one year for bringing action prescribed by sec. 195, sub-sec. 3 of the Ontario Election Act applies only to actions for penalties under that section and not to proceedings by summons for corrupt practices under secs. 187-8, nor are the latter within the limitation of two years for actions prescribed by R.S.O. ch. 72, sec. 1.

On such proceeding under secs. 187-8 the Judges may, if they see fit, hear the evidence on all the charges before giving judgment on any of them.

THIS was a motion by way of appeal from an order of ROSE, J., refusing a *certiorari* for the removal of the proceedings in this matter.

The applicant, A. E. Cross, was convicted on April 24th, 1900, of three several corrupt practices before OSLER and MACLENNAN, JJ.A., sitting under secs. 187 and 188 of R.S.O. ch. 9, as a Court for the trial of corrupt practices committed at an election held under "The Ontario Election Act" on February 22nd, 1898, and March 1st, 1898. A penalty of $200 was imposed for each offence, making $600 in all, which sum, with costs, he was ordered to pay within one month, and it was ordered that in default of payment he should be imprisoned for six months unless the penalties and costs should be sooner paid.

On May 25th, 1900, a motion was made in Chambers before ROSE, J., for a *certiorari* to remove the proceedings

into the High Court. This was refused after argument, but no written reasons were given.

The motion was renewed by way of appeal and as a substantive motion before the Divisional Court consisting of FALCONBRIDGE, C.J., and STREET, J.

Lynch-Staunton, Q.C., for the motion, referred to *Lennox Election Case* (1885), 1 E. C. 422, at p. 426; *Muskoka Election Case* (1876), H. E. C. 458, at p. 480; *Hamilton* v. *Walker* (1892), 56 J.P. 583; *Regina* v. *McBerney* (1897), 3 Can. Crim. Cases 339; *Regina* v. *Fry* (1898), 19 Cox 135; Woods on Mandamus, p. 194; R.S.O. ch. 9, secs. 187, 195, sub-sec. 3.

Dymond, for the Attorney-General, referred to Comyn's Dig., vol. 2, p. 340; Encl. of Law of Eng., vol. 2, p. 421, Tit. "Certiorari;" *Re McQuillan* v. *The Guelph Junction R. W. Co.* (1887), 12 P.R. 294; R.S.O. ch. 9, sec. 188, sub-sec. 4.

FALCONBRIDGE, C.J.:—

At the argument we intimated to counsel that in our opinion this proceeding was not an "action" within the meaning of The Ontario Election Act, sec. 195, sub-sec. (3), or of R.S.O. ch. 72, sec. 1, sub-sec. (*g*), and there is nothing in this objection.

Nor does the second ground of objection (as to the reservation of judgment) seem to be better founded.

In *Reg.* v. *Fry*, 19 Cox 135, the Justices stated that, in adjudicating on each case they applied to that case the evidence that was given in reference to it and no other. It was held that the postponement by the Justices of their decision in the first case until they had disposed of the other cases did not, under the circumstances, render the conviction in the first case bad in law.

We may safely assume that the learned Judges in the present matter decided each charge on its own merits.

I have not considered, and I do not pass upon the question, whether *certiorari* lies to remove this conviction.

STREET, J. :—

The grounds upon which the application for *certiorari* was rested were two :—

1st. That the proceedings having been commenced after the expiration of one year from the time the corrupt practices were committed, were barred by sub-sec. 3 of sec. 195 of R.S.O. ch. 9.

2nd. That the Judges who constituted the Court reserved their judgment after hearing the evidence upon one of the charges until they had heard the evidence in the others.

The first of these objections to the conviction is clearly not supported by the statute referred to. By sec. 195 of R.S.O. ch. 9, an action is given to any one who sues for any penalty imposed by the Act. In such an action the plaintiff is entitled to allege that the defendant is indebted to him in the amount of the penalty, and the action is to be tried by a Judge without a jury. It is this action which is to be commenced within a year after the act committed, and not the prosecution authorized by secs. 187 *et seq.*, which is not an action, and is not begun by a writ but by a summons, and is in the nature of a criminal proceeding.

The second objection appears to me to be also unsustainable. It is provided by sec. 188, sub-sec. (1) that several charges of corrupt practices may be stated in the summons requiring the defendant to appear, and by sub-sec. (7) the Court may adjudge after hearing the evidence that he has been guilty of the corrupt practice or corrupt practices, and may order him to pay the penalty or penalties assigned by the statute to the offence or offences of which he has been convicted ; then by sub-sec. (11),

where a penalty or penalties is or are imposed, they shall direct that unless the amount be paid within a time not exceeding one month, the person convicted shall be imprisoned for a period not exceeding one year.

The statute, therefore, expressly contemplates and permits any number of corrupt practices to be charged in the same summons and to be tried together, and requires one term of imprisonment to be imposed in default of payment of the total amount of the penalties for all the corrupt practices included in the summons of which the person charged has been convicted.

It was argued that it was contrary to established principles to try the applicant upon the subsequent charges without first disposing of that upon which the evidence had been taken; but we find a special provision in sec. 626 of the Criminal Code, 55-56 Vict. c. 29, (D.), for the trial at the same time and upon the same indictment of three distinct charges of theft alleged to have been committed within six months of one another by a prisoner. Upon the trial of such an indictment, it is manifest that the jury must be placed in possession of the evidence upon all the charges before being required to find the verdict upon any of them. The danger that a jury might not separate and properly apply the evidence upon the different charges in dealing with them is surely much greater than that a Judge might not do so. There are other instances to be found in the Criminal Code of the same character, and there is plainly no violation of any principle in giving to the provisions of sec. 188 of R.S.O. ch. 9 the meaning which seems plain upon their face, viz., that any number of corrupt practices charged as having been committed by the defendant at the same election are intended to be tried together and to be included in the same judgment.

I think, therefore, that the course taken by the Court which tried the defendant, in refusing to pronounce separate judgments upon each charge until the evidence

upon all the charges was complete on both sides, was entirely correct.

I have examined the cases referred to by counsel for the present motion, viz.: *The Queen* v. *McBerney*, 3 Can. Crim. Cases 339; *Hamilton* v. *Walker*, [1892] 2 Q.B. 25; *Reg.* v. *Hazen* (1893), 23 O.R. 387; S.C. in App., 20 A.R. 633, but I find nothing in them which requires me to change the view I have expressed; see also *Reg.* v. *Fry*, 19 Cox 135.

The motion and appeal must therefore be dismissed with costs.

A. H. F. L.

RE VOTERS' LISTS OF MARMORA AND LAKE.

ONTARIO VOTERS' LISTS ACT.

BEFORE MOSS, J.A.,

10th and 11th December, 1900.

Voters' Lists—Notice of Complaint—Loss of—Parol Evidence.

A list of appeals, containing names sought to be added to the voters' lists, was prepared, and a voter's notice of complaint in Form 6 to the Ontario Voters' Lists Act, R.S.O. 1897 ch. 7, was signed, by the complainant, attached to the list of names to be added, and handed to the clerk in his office within the thirty days required by the statute. When the list was produced by the clerk in Court, the notice of complaint was missing:—

Held, that it was competent for the Judge to hear and receive parol evidence as to the form and effect of the notice in question and of its loss; and that, upon his being satisfied by such evidence that a sufficient notice of complaint was duly left with the clerk, the complaint might be dealt with.

STATED case heard under the statute. The facts appear in the judgment.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

W. J. Moore, for certain voters.

Moss, J.A. :—

Case stated by the junior Judge of the county of Hastings and referred by the Lieutenant-Governor in Council under sec. 38 of the Ontario Voters' Lists Act, R.S.O. 1897 ch. 7.

A list of appeals containing a large number of names to be added to the voters' lists for the municipality of the Townships of Marmora and Lake was prepared, and a voter's notice of complaint in the statutory form was signed by the objecting voter and attached to the list of names. The document in this form was handed to the clerk of the municipality in due time to comply with sec. 17 (1) of the Voters' Lists Act. At the sitting of the Court to hear complaints against the voters' lists the clerk produced the list of names, but not the notice of complaint, which was attached to it when he received it. He admitted under oath that at the time the list was placed in his hands, and for some time subsequently, there was attached a voter's notice of complaint, in the form required by the statute, dated, and properly signed by the complainant, and stated that the first time the absence of the notice of complaint was noticed was the night before the day of the Court, and that he had made diligent search in his office and the same could not be found. It appeared that he kept the original lists of appeals very carelessly in a pigeon hole in the office of his drug store, where he usually kept municipal papers, and that it was a place to which the public had access. Other evidence under oath was received to shew the preparation of the lists and notice, the signing by the complainant, and the delivery to the clerk, in proper form and within the time prescribed by the statute.

It was objected that the list produced in Court contained no signature of the complainant, and that no voter's notice of appeal being produced, there were no appeals before the Court. It was further objected that, the list coming from

the hands of the clerk and being imperfect, verbal evidence could not be given to amend it.

The question submitted is: Can a complaint in regard to a voters' list be heard without the papers before the Judge containing a written notice of the complaint and intention to apply to him, it being shewn by parol evidence that such notice had been left with or given to the clerk at the proper time but subsequently lost?

By sec. 17 (1) of the Voters' Lists Act it is made the duty of a voter or person entitled to be a voter making a complaint of any error or omission in the list to give to the clerk of the municipality, in the manner and within the time prescribed, notice in writing (Form 6) of his complaint and intention to apply to the Judge. Upon receipt of a proper notice it becomes the duty of the clerk to take steps to notify the Judge and arrange for the holding of a Court to hear the complaints and to publish a notice of the time and place of holding the Court in some newspaper: sec. 17 (3) (5). Nothing further is required to be done by the complainant in order to perfect his appeal, and he is entitled to assume that at the sitting of the Court the list and notice of complaint which he lodged with the clerk will be produced in the same plight as when received.

It appears that Form 6 was not strictly adhered to, the notice of complaint having been attached to the list of complaints, instead of the latter being appended to the notice, but the form adopted was apparently sufficient under sec. 4 of the Act.

The appeal or complaint having been duly lodged, the complainant is not to be deprived of his right to have it heard and disposed of because of the inability of the clerk to produce the notice in Court. The default is in no way attributable to the complainant. In this case it is due to the clerk's nonfeasance. But if it had been due to accident such as the burning of the clerk's office or the destruction of the papers by mistake, the complainant

ought not to suffer if it be found possible to prove the contents of the papers so as to enable the Judge to proceed with the appeal and deal with the complaints.

I assume that in this case the contents of the notice can be shewn before the Judge and that he will have no difficulty in ascertaining with reasonable certainty the nature of the objections made to the voters' list. And I think it competent for the Judge to receive evidence to shew the loss and contents of the notice, and, if satisfied in regard thereto, to proceed to deal with the complaints in the manner prescribed by the statute.

E. B. B.

RE VOTERS' LISTS OF MADOC.

ONTARIO VOTERS' LISTS ACT.

BEFORE MOSS, J.A.

10th and 11th December, 1900.

Voters' Lists — Notice of Complaint — Service on Clerk — Registered Letter.

A notice of complaint, with list of names, was received by the clerk through the mail by registered letter, in due time :—

Held, that sec. 17 (1) of the Voters' Lists Act, R.S.O. 1897 ch. 7, had been complied with.

STATED case heard under the statute. The facts appear in the judgment.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

W. J. Moore, for certain voters.

MOSS, J.A.:—

Case stated by the junior Judge of the county of Hastings and referred by the Lieutenant-Governor in

Council under sec. 38 of the Ontario Voters' Lists Act, R.S.O. 1897 ch. 7.

Sec. 17 (1) of the Act provides that "a voter . . . making a complaint . . . shall, within thirty days after the clerk of the municipality has posted up the list in his office, give to the clerk or leave for him at his residence or place of business, notice in writing . . . of his complaint and intention to apply to the Judge in respect thereof."

The case finds that the clerk of the municipality of the township of Madoc posted up the lists of voters for the municipality in his office on the 23rd August, 1900, and that on the 21st September, 1900, notice of complaint with list of names was received by the clerk through the mail by registered letter.

The notice, therefore, came to the hands of the clerk within thirty days after he had posted up the lists. But at the sitting of the Court held for the hearing of complaints against the lists objection was taken to the list of names and notice of complaint on the ground that the notice was not properly given. It was objected that sec. 17 (1) requires either personal service upon the clerk or upon a grown up person at his residence or place of business, and that his receipt of the notice of complaint from the post office official was not a compliance with the provision. The question upon the case is: Can this list be entertained?

The important matter to be attended to under sec. 17 (1) is the receipt in due time by the clerk of any notice of complaint intended to be given him. Two modes of service are prescribed, one which permits of its being shewn that it actually came to his hands, the other which makes it sufficient to shew that it was left at his place of residence or business without proceeding further to shew that it came to his hands.

I think when the statute says that the objecting voter

shall give to the clerk notice in writing, it means that he is required to shew that the notice reached him within the proper time. And if it be proved or admitted to have actually reached him in due time, it is quite immaterial how it reached him. It may be sent by a private messenger or by a bailiff or sheriff's officer or any other reliable agent. There appears to be no good reason why the post office should not be made the agent. This was the view taken by the full Court of Common Pleas in *Smith* v. *James* (1861), 11 C.B.N.S. 62, Byles, J., remarking at p. 67: "And I must confess I do not see why the postmaster-general should be the less the agent of the objector for this purpose because he is a public officer."

No doubt, if a notice placed in the post failed to reach the clerk, or failed to reach him in due time, it would not be deemed to have been given to him as required, and the party using the post must assume the risk of being unable to shew that it came in due time to the hand for which it was intended.

Reliance was placed upon a sentence in Mr. Hodgins's useful Manual on Voters' Lists, 2nd ed., at p. 45, to the effect that service by post or registered letter is not provided for. But it is plain that the learned author does not mean to convey the idea that service by these means may not prove sufficient. He is merely stating the fact that there is no special provision, and later on in the same note he states that the notice must be served in such a way as to come to the knowledge of the person intended to be served.

For these reasons, I shall certify to His Honour the Lieutenant-Governor that, in my opinion, the list in question should be entertained.

E. B. B.

END OF VOLUME II.

A DIGEST

OF THE

CASES REPORTED IN THIS VOLUME.

ACTION.

Limitation of.]—*See* CORRUPT PRACTICES, 5.

AGENCY.

See CORRUPT PRACTICES, 2, 4

ALIENS.

See CORRUPT PRACTICES, 2.

AMBIGUITY.

See BALLOT, 3.

APPEAL.

See PARTICULARS.

ASSESSMENT ROLL.

Final Revision of.] —*See* VOTERS LISTS, 2.

BALLOT.

1. *Marking of—Division of—Portion Removed.*]—If a ballot is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a compliance with the provisions of the Act, according to any fair and reasonable construction of it, the vote should be allowed:—

Held, that the dividing lines on the ballot between the names of the candidates, and not the lines between the numbers and the names, indicate the divisions within which the voter's cross should be placed, and the space containing the number is part of the division of the ballot containing the candidate's name, and that votes marked by a cross to the left of the lines between the numbers and the names were good.

Held, also, that a ballot, from which a portion of the blank part on the right-hand side had been removed, leaving all the printed matter except a portion of the lines separating the names, but which was properly marked by the voter, was good.

Held, also, that ballots marked for both candidates, and a ballot marked on the back, although over a candidate's name, were properly rejected.

Held, also, that certain ballots

with other marks on them besides the cross were good or bad under the circumstances of each case set out in the report.

Held, also, that a ballot, having the name of a candidate marked on its face in pencil, in addition to being properly marked for that candidate, was good; that a ballot with two initials on the back as well as those of the deputy returning officer was good; that a ballot with the name of a voter on the back was bad; and that ballots with certain peculiar crosses marked thereon were good. *West Elgin* (No.1.) (*Provincial*), 38.

2. *Marked with numbers—By Deputy Returning Officer—Marking cross on left-hand side—Name of candidate printed in wrong division — Uncertainty.*]—The fact that a number has been placed on the back of each ballot paper in a voting sub-division, in pencil, by the Deputy Returning Officer, will not invalidate them.

The fact that the cross is marked in the division on the left-hand side of the ballot paper containing the candidate's number, and not in the division containing his name, will not invalidate it. The *West Elgin Case*, ante p. 38, followed.

Where the printer had printed the surname of a candidate too high up and in the division of the ballot paper occupied by the name of another candidate:—

Held, that the ballots marked with a cross above the dividing line but opposite to the surname so placed could not be counted for such candidate, but were either marked for the other candidate, or were void for uncertainty. *South Perth* (1898), (*Provincial*), 47.

3. *Division of—Names of candidates in—Uncertainty as to—Ambiguity.*]—Where the surname of a candidate has been printed so high up in the ballot paper as to appear in the division containing the name of another candidate and to lead to uncertainty as to which of the two candidates' divisions of the ballot paper it was in, it was held that the votes marked opposite to such surname were ambiguous and could not be counted for either candidate, and under the circumstances a new election was ordered. *South Perth* (1898) (*Provincial*), 52.

4. *Marking—Validity of.*]—A ballot properly marked, but not initialed by the deputy returning officer, having instead the initials C.S., which appeared, and were assumed, to be those of the poll clerk, was held good.

A ballot from which the official number was torn off, without anything to shew how it happened, was held bad.

Ballots marked—/ or ∨ or ∧ were held good.

Jenkins v. *Brecken* (1883), 7 S.C.R. 247, followed.

Ballots marked for a candidate, but having (1) the word "vote" written after his name; (2) having the word "Jos.," being an abbreviation of the candidate's christian name, written before his name; (3) having the candidate's surname written on the back of the ballot, were held bad.—*West Huron* (*Provincial*), 58.

BETTING.

See CORRUPT PRACTICES, 3.

BRIBERY.

See CORRUPT PRACTICES, 3. —TREATING.

BYE-ELECTION.

Writ for.] — *See* CORRUPT PRACTICES, 4.

CANDIDATE.

Treating.] — *See* CORRUPT PRACTICES, 1.

CASES.

Haldimand Case (1888), 1 E.C. 529, distinguished.]—*See* CORRUPT PRACTICES, 3.

Haldimand Case (1890), 1 E.C. 572, distinguished.]—*See* CORRUPT PRACTICES, 3.

Jenkins v. *Brecken* (1883), 7 S.C.R. 247 followed.]—*See* BALLOT, 4.

West Elgin Case, ante p. 38 followed.]—*See* BALLOT, 2.

CLERK.

Service on by registered letter.] —*See* VOTERS LISTS, 4.

COLLUSION.

See SOLICITOR.

CORRUPT PRACTICES.

1. *Treating — Candidate — Corrupt Intent — Habit.*]—The undisputed evidence shewed that the respondent from the time of his nomination as the candidate of his party frequently treated the electors and others in the bar-rooms of hotels whilst engaged in his canvass. He was not a man whose ordinary habit it was to treat, nor one who, in the course of his ordinary occupation, frequented bar-rooms.

Held, OSLER, J.A., dissenting, that the trial Judges properly drew the inference that the treating was done with corrupt intent, so as to avoid the election of the respondent.

Remarks by BURTON, J.A., on the amendment to the Election Act, in respect to "the habit of treating," by 58 Vict., ch. 4, sec. 21 (O.). *West Wellington* (*Provincial*), 16.

2. *Aliens — Non-residents — Voting Without Right—Actual*

knowledge—Agency—Evidence —R.S.O. 1887, ch. 9, sec. 160.]—Actual knowledge on the part of a voter that he has no right to vote is necessary to constitute a corrupt practice under R.S.O. 1887, ch. 9, sec. 160.

Evidence to establish agency discussed and found insufficient. *South Riding, County of Perth (Provincial)*, 30.

3. *Voting Without Right—Knowledge — Bribery — Inference from Evidence—Providing Money for Betting — Loan — Agency—Pooof of—Party Association.*]—It was charged that a person had voted at an election knowing that he had no right to vote by reason of his not being a resident of the electoral district. He knew that his name was on the voters list, and that it had been maintained there by the County Judge, notwithstanding an appeal, and he believed that he had, and did not know that he had not a right to vote :—

Held, affirming the decision of the trial Judges, that a corrupt practice under sec. 168 of the Election Act, R.S.O. 1897 ch. 9, was not established. Under that section the existence of the *mala mens* on the part of the voter," *knowing* that he *has no right* to vote," not merely his knowledge of facts upon the legal construction of which that right depends, must be proved. The offence does not depend upon his having taken the oath; it may be proved apart from that; nor does the fact that he has taken the oath, even if it be shewn in point of law to be untrue, necessarily prove that the offence has been committed.

Haldimand Case (1888), 1 Elec. Cas. 529, distinguished.

(2) *Held*, affirming the decision of the trial Judges, that the bribery by L. of two persons to abstain from voting against the respondent was established by the evidence, although it was not shewn that anything was said to them about voting, L. having paid them for trifling services which he engaged them to perform upon election day, sums considerably in excess of the value of such services, knowing them to be voters and to belong to the opposite political party.

(3) As to the agency of L., it appeared that the respondent was brought into the field as the candidate of his party, having been nominated at a convention of the party association for the electoral district; L. was not a delegate to, nor was he present at, the convention; and he was not upon the evidence connected with the association or its officers; he was not brought into touch with the candidate, nor any proved agent of his, either as regards his or their knowledge of the fact that he was working or proposing to work on behalf of the candidate, or as regards any actual authority conferred upon him to do so. But

he was present at three meetings of electors when the voters' list was gone over; he acted as chairman of a public meeting called in the respondent's interest; he canvassed some voters; and, from his antecedents, the respondent hoped or believed or expected that he would be an active supporter:—

Held, affirming the decision of the trial Judges, BOYD, C., dissenting, that L. was not an agent of the respondent.

Haldimand Case (1890), 1 Elec. Cas. 572, distinguished.

(4) Three persons, T. being one of them, each lent $10 to R.L., knowing that the moneys so lent were intended to be used by him, as he then told them, in betting on the result of the election. Any bet or bets which he made were to be his own bets, not theirs, and he was to return the money in a couple of days. He did not succeed in getting anyone to bet with him, and he returned the money to each on the following day:—

Held, affirming the decision of the trial Judges, that this was providing money to be used by another in betting upon the election, and was a corrupt practice within the meaning of sec. 164 (2) of the Election Act.

(5) As to the agency of T., it appeared that he was one of the local vice-presidents of the party association above referred to; he had been present at two meetings of local party men calling themselves a "Conservative Club," who were interesting themselves in the election, and had contributed towards the cost of hiring the club-room; at these meetings he had gone over the voters list with others, which was the only work done; at a meeting held by the respondent in the place where T. lived, he had presided, having been elected chairman by the audience, and he made a speech introducing and commending the repondent; before the meeting he had met the respondent in the street, had shaken hands with him, and asked him how things were going. The respondent did not know that T. was local vice-president, and had never heard of the "Conservative Club." T. was not a delegate to the nominating convention nor present thereat. The association, as such, was not charged with any definite duty in connection with the election except the selection of a candidate:—

Held, reversing the decision of the trial Judges, BURTON, C. J.O., and MACLENNAN, J.A., dissenting, that T. was an agent of the respondent. *East Elgin* (*Provincial*), 100.

4. *Intoxicating Liquor at Card Party—Payment by Subscription — German Custom — Voters Lists —Finality —Issue of Writ for Bye-election— Power of Legislative Assembly.*] —A number of voters met at a voter's house for the purpose of going over the voters lists and

then of having a card party. After the lists were disposed of the card party took place, and meat and drink were supplied by the host, but the drink, a quarter cask of beer, was paid for by subscription, according to the custom of the locality, which was a German settlement:—

Held, not a corrupt practice within the meaning of sec. 161 of the Elections Act, R. S. O. 1897, ch. 9.

Held, also, that no enquiry could be made on a scrutiny as to voters being under the age of twenty-one, as the voters lists were final and conclusive on that point:—

Held, also, that the Legislative Assembly has power while in session to order the issue of a writ to hold a bye-election, sec. 33 of R.S.O. 1897, ch. 12, applying only to vacancies occuring while the Assembly is not in session. *South Perth* (*1899*) (*Provincial*), 144.

5. *Provincial Elections—Corrupt Practices—Proceedings by summons—Limitation—Several Charges—R.S.O. 1897, ch. 9, secs. 187-8, 195.*]—The limitation of one year for bringing action prescribed by sec. 195, sub-sec. 3 of the Ontario Election Act applies only to actions for penalties under that section, and not to proceedings by summons for corrupt practices under secs. 187-8, nor are the latter within the limitation of two years for actions prescribed by R.S.O. ch. 72, sec. 1.

On such proceeding under secs. 187-8 the Judges may, if they see fit, hear the evidence on all the charges before giving judgment on any of them. *Halton* (*Provincial*), 158.

COSTS.

1. *Cross Petition—Security for Costs.*]—Under sec. 13 of the Controverted Elections Act, R.S.O. 1887, ch. 10, security for costs is required only in the case of the original or principal petition, and not in that of a cross petition. *Kingston* (*Provincial*), 10.

2. *Dismissal of Petition at Trial, Sheriff's Costs of Publication—Payment by Petitioner—Claim on Security Deposited.*]—Where an election petition is dismissed at the trial without costs the petitioner must pay to the sheriff the costs incurred in the publication of the notice of trial thereof; and although the sum deposited as security is not security for such expenditure, payment out of Court will only be ordered on the condition of its being made good to the sheriff. No charge can be made by the sheriff for attending to the publication, no allowance therefor being authorized by the tariff. *East Middlesex* (*Provincial*), 150.

Security for.]—*See* PETITION, 1.

Security for—Deposit.]—*See* SOLICITOR.

CROSS PETITION.

See COSTS, 1.

CUSTOM.

See CORRUPT PRACTICES, 4.

DEPOSIT.

Lien on.]—*See* COSTS, 2.—SOLICITOR.

DEPUTY RETURNING OFFICER.

See BALLOT, 2.

EVIDENCE.

See CORRUPT PRACTICES, 2.

FREEHOLDERS.

See VOTERS LISTS, 2.

INTOXICATING LIQUORS.

See CORRUPT PRACTICES, 4.

JUDGMENT.

See PARTICULARS.

JURISDICTION.

Substituting Petitioners.]—*See* PETITION, 1.

Service out of.]—*See* PETITION, 2.

KNOWLEDGE.

See CORRUPT PRACTICES, 2, 4.

LEGISLATIVE ASSEMBLY.

Powers in Session—Vacancy—Issue of Writ.]—*See* CORRUPT PRACTICES, 4.

LETTER.

Registered—Service by.]—*See* VOTERS LISTS, 4.

LIMITATION OF ACTION.

See CORRUPT PRACTICES, 6.

LOSS.

Of Notice of Complaint.]—*See* VOTERS LISTS, 3.

MEETING OF ELECTORS.

See TREATING.

MEMBERS.

Return of—When Made—R.S.O. 1897 ch. 11, sec. 9—Presentation of Petition—Notice of Endorsement on Petition—Necessity for Separate Notice.]—

The return of a member by the returning officer is only made when it has been actually received by the clerk of the crown in chancery, and not when the returning officer has placed it in the express or postoffice for transmission to such clerk.

It is not essential under the Ontario Act, R.S.O. 1897 ch. 11, sec. 15, that a notice of the presentation of a petition should be served, where such notice is indorsed on the petition. *Ottawa (Provincial)*, 64.

NOTICE.

Endorsement on Petition—Separate Notice—Necessity for.]—*See* MEMBERS.

Of Complaint.]—*See* VOTERS LISTS, 3, 4.

NOTICE OF TRIAL.

Sheriff's Costs of.]—*See* COSTS, 2.

PAROL EVIDENCE.

See VOTERS LISTS, 3.

PARTICULARS.

Verification of — Appeal — Vagueness of Particulars.—In proceedings under the Controverted Elections Act, R.S.O. 1897 ch. 11, it is sufficient to attach an affidavit of verification to the particulars filed, without serving an affidavit of verification on the respondent.

It is too late on appeal from the judgment on an election petition to object to the insufficiency or vagueness of the particulars. *North Waterloo (Provincial)*, 76.

PETITION.

1. *Substituting New Petitioner—Jurisdiction—Dominion.*]—The Court has no power in a proceeding under the Dominion Controverted Election Act to substitute a new petitioner unless either no day has been fixed within the time prescribed by statute or notice of withdrawal has been given by the petitioner; and where a petition came regularly down to trial and the petitioner stated he had no evidence to offer, an application of a third party to be substituted as petitioner upon vague charges made on information and belief, of collusion in the dropping of the petition, which were contradicted, and of corrupt practices, was refused and the petition dismissed with costs. *South Riding of Essex (Dominion)*, 6.

2. *Service Out of Jurisdiction.*]—A petition to unseat a member may be duly served out of the jurisdiction of the Court; and it is not essential that an application should be made for leave to effect such service, or

for allowing the service so made. *West Algoma (Provincial)*, 13.

Dismissal of—Sheriff's Costs.]—*See* COSTS, 2.

Withdrawal—Substitution of Petitioners.]—*See* SOLICITOR.

Presentation of.]—*See* MEMBERS.

QUALIFICATION.

See VOTERS LISTS, 2.

REGISTERED LETTER.

Service by.]—*See* VOTERS LISTS, 4.

RESIDENCE.

See CORRUPT PRACTICES, 2. VOTERS LISTS, 1.

RETURN OF MEMBER.

When Made.]—*See* MEMBERS.

SAVING CLAUSE.

1. *R.S.O. 1897 ch. 9, sec. 172 — Bribery — General Election Fund — Majority.* — Where only two acts of bribery were proved, but the perpetrators were both active, and one an important agent of the candidate, neither of whom was called at the trial, and one of the bribes, though only $2, was paid out of a general election fund, to which the respondent had contributed $250, and the respondent's majority was 65 out of a total vote of about 5,000:—

Held, that the election was rightly avoided, notwithstanding the saving clause in sec. 172 R.S.O. ch. 9. *North Waterloo (Provincial)*, 76.

2. *R.S.O. 1897 ch. 9, sec. 172 — Majority — Undue Influence — Bribery.*]—The total vote polled was over 4,500, and the majority for the respondent was 29. The trial Judges had reported one person guilty of an act of undue influence, three, of being concerned in acts of bribery, and T. and two others of providing money for betting:—

Held, that sec. 172 of the Election Act could not be applied to save the election. *East Elgin (Provincial)*, 100.

SECURITY FOR COSTS.

See COSTS.

SERVICE.

Of Petition Out of Jurisdiction.]—*See* PETITION, 3.

Of Notice of Complaint.]—*See* VOTERS LISTS, 4.

SHERIFF.

Costs of Publication—Notice of Trial.]—*See* COSTS, 2.

STATUTES.

R.S.O. 1887, ch. 9, sec. 160.]—*See* CORRUPT PRACTICES, 2.

58 Vic., ch. 4, sec. 21, (O.)]—*See* CORRUPT PRACTICES, 1.

R.S.O. 1897, ch. 7, secs. 8, 14 (7), 17 (1), Form 6.]—*See* VOTERS LISTS, 1, 2, 3, 4.

R.S.O. 1897, ch. 9, secs. 159, 161.]—*See* TREATING.

R.S.O. 1897, ch. 9, sec. 161.]—*See* CORRUPT PRACTICES, 4.

R.S.O. 1897, ch. 9, secs. 164 (2), 168.]—*See* CORRUPT PRACTICES, 3—SAVING CLAUSE, 1.

R.S.O. 1897, ch. 9, secs. 187, 188, 195.]—*See* CORRUPT PRACTICES, 5.

R.S.O. 1897, ch. 10, sec. 13.]—*See* COSTS, 2.

R.S.O. 1897, ch. 11, sec. 9.]—*See* MEMBERS.

R.S.O. 1897, ch. 11, sec. 48.—*See* TRIAL OF PETITION.

R.S.O. 1897, ch. 12, sec. 33.]—*See* CORRUPT PRACTICES, 5.

R.S.O. 1897, ch. 72, sec. 1, sub-sec. (*g*).]—*See* CORRUPT PRACTICES, 5.

R.S.O. 1897, ch. 223, sec. 86.]—*See* VOTERS LISTS, 2.

SOLICITOR.

Change of Solicitors — Right to Object to — Withdrawal of Petition—Deposit as Security for Costs—Time to Apply to Substitute Petitioner.]—The only person who can complain of an order changing solicitors in an election matter is the former solicitor, and his right is a limited right; and the Court will not consider it unless as a part of a scheme to get rid of the petition.

An ordinary voter has no status to attack the order.

Even if the applicant here had the right to move against an order allowing the petition to be withdrawn:—

Held, on the evidence adduced, that there was no irregularity in the application to withdraw.

Semble, even if there was reason to suspect collusion, the petitioner has the right to withdraw, but the Judge might order that the deposit should remain as security for the costs of a substituted petitioner.

The proper time to make an application to substitute a petitioner is at the time the motion is made to withdraw the petition, and the Judge's power is limited in that respect. If no application is then made, and the order for withdrawal is granted, the petition is out of Court and cannot be revived.

Even if there was power to make such an order at a later period it should be applied for within a reasonable time and full explanation of the delay given, neither of which conditions being complied with and

a delay of more than two months occurring :—

Held, that the application here was too late. *South Leeds (Dominion)*, 1.

SUBSTITUTION OF PETITIONER.

See PETITION, 1.
—SOLICITOR.

SUMMONS FOR CORRUPT PRACTICES.

See CORRUPT PRACTICES, 5.

TENANTS.

See VOTERS LISTS, 2.

TIME.

For Substitution of Petitioner.]—*See* SOLICITOR.

TREATING.

Treating a Meeting—Distinction between Bribery and Treating—R.S.O. 1897 ch. 9, secs. 159, 161.]—Where after a meeting of electors had broken up, an alleged agent of the respondent had treated at the bar of the hotel, where it had been held, a mixed multitude comprised of some who had been at it, and others who had not :—

Held, (MACLENNAN, J.A., dissenting), that this was not treating "a meeting of electors assembled for the purpose of promoting the election," within sec. 161 of the Ontario Election Act, R.S.O. 1897 ch. 9.

Per MACLENNAN, J.A., seeing that several persons assembled at the bar waiting for the meeting were treated before the meeting by the hotelkeeper, whom the respondent's agent had asked to treat "the boys" before himself leaving to attend a meeting elsewhere, and whom the agent afterwards paid, and that several who were treated after the meeting had been at the meeting, and then in company with the respondent went very much in a body to another hotel, where they were treated again. Held that this was a treating of the meeting within the last mentioned section.

Held, also, by the Court of Appeal, reversing the decision of the trial Judges, that such treating was not "bribery" within R.S.O. 1897 ch. 9, sec. 159.

Corrupt treating in its nature runs very close to bribery on the part of the treater, but the circumstances in which a treat can be said to be a valuable consideration within sec. 159 so as to amount to bribery on the part of the person accepting it, must be unusual. *North Waterloo (Provincial)*, 76.

See CORRUPT PRACTICES, 1, 4.

TRIAL.

Notice of—Sheriff's Costs of.]—*See* COSTS, 2.

TRIAL OF PETITION.

Judgment Within 15 Days of Session—R.S.O. 1897 ch. 11, sec. 48.]—Notwithstanding R.S.O. 1897 ch. 11, sec. 48, providing against the trial of a petition during a session or within 15 days from the close thereof, when judgment has been reserved after examination of witnesses and hearing and the arguments of counsel, the trial Court may give judgment and issue their certificate and report at any time whether during or after a session. *North Waterloo (Provincial)*, 76.

UNCERTAINTY.

See BALLOT, 2, 3.

VOTERS.

Alien.]—*See* CORRUPT PRACTICES, 2.

VOTERS LISTS.

1. *"Resided Continuously"—Meaning of.*]—The provision of sec. 8 of the Ontario Voters List Act, R.S.O. 1897 ch. 7, that persons to be qualified to vote at an election for the Legislative Assembly must have resided continuously in the electoral district for the period specified, does not mean a residence *de die in diem*, but that there should be no break in the residence; that they should not have acquired a new residence; and where the absence is merely temporary, the qualification is not affected.

Where, therefore, persons resident within an electoral district, and otherwise qualified, went to another Province merely to take part in harvesting work there, and with the intention of returning, which they did, their absence was held to be of a temporary character, and their qualification was not thereby affected. *Re Voters Lists of the Township of Seymour*, 69.

2. *Assessment made in previous year—Qualification arising subsequent to final revision of roll—Freeholders—Tenants.*]—Where the assessment for a city, on which the rate for the year 1898 was levied and the voters list based, was made in previous year, the roll having been finally revised on the 2nd December, 1897, freeholders, who were such between that date and the last day for the revision of the voters lists, were, under sec. 86 of the Municipal Act, R.S.O. (1897) ch. 223, and sec. 14 (7) of the Ontario Voters Lists Act, R.S.O. (1897) ch. 7, held entitled to be placed on the list; and freeholders also who had parted with the property for which they were assessed, but had acquired other sufficient property, were held entitled to remain on the list; otherwise as regards tenants, under similar circumstances, the form of oath required to be made by them

precluding them. *Re Voters Lists of St. Thomas*, 154.

3. *Notice of Complaint—Loss of—Parol Evidence.*]—A list of appeals, containing names sought to be added to the voters lists, was prepared, and a voter's notice of complaint in Form 6 to the Ontario Voters Lists Act, R.S.O. 1897, ch. 7, was signed by the complainant, attached to the list of names to be added, and handed to the clerk in his office within the thirty days required by the statute. When the list was produced by the clerk in Court, the notice of complaint was missing:—

Held, that it was competent for the Judge to hear and receive parol evidence as to the form and effect of the notice in question and of its loss; and that, upon his being satisfied by such evidence that a sufficient notice of complaint was duly left with the clerk, the complaint might be dealt with. *Re Voters Lists of Marmora and Lake*, 162.

4. *Notice of Complaint—Service on Clerk—Registered Letter.*]—A notice of complaint, with list of names, was received by the clerk through the mail by registered letter, in due time:—

Held, that sec. 17 (1) of the Voters Lists Act, R.S.O. 1897, ch. 7, had been complied with. *Re Voters Lists of Madoc*, 165.

See CORRUPT PRACTICE, 5.

WORDS.

"*Resided Continuously.*"]—*See* VOTERS LISTS, 1.

WRIT.

Issue of for Election.]—*See* CORRUPT PRACTICES, 5.